TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 77.

JULES S. BACHE, APPELLANT,

vs.

SAMUEL HUNT, AS RECEIVER OF THE ST. LOUIS, TOLEDO AND KANSAS CITY RAILROAD COMPANY, AND TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED DECEMBER 28, 1903.

(16,765.)

16507

(18,765.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 537.

JULES S. BACHE, APPELLANT,

vs.

SAMUEL HUNT, AS RECEIVER OF THE ST. LOUIS, TOLEDO AND KANSAS CITY RAILROAD COMPANY, AND TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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a Supreme Court of the United States.

CONTINENTAL TRUST CO. ET AL.
vs.
TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD CO. ET AL. } No. —.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company.

Transcript of Record.

Appeal from the circuit court of the United States for the northern district of Ohio, western division.

Spiegelberg & Wise, 44 Broad street, New York city, N. Y., solicitors for Jules S. Bache, appellant.

Butler, Notman, Joline & Mynderse, 54 Wall street, New York city, N. Y.,

Clarence Brown, Esq., Toledo, Ohio, solicitors for The Toledo, St. Louis & Western Railroad Company, appellee.

1 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

Record of the proceedings of the circuit court of the United States within and for the western division of the northern district of Ohio in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the city of Toledo, in said district, on the first Tuesday in December, being the second day of said month, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the 127th, to wit, on the 4th day of December, A. D. 1902.

Present: The Honorable Francis J. Wing, United States district judge.

CONTINENTAL TRUST COMPANY OF THE City of New York, etc., Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY Railroad Company *et al.*, Respondents. } No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE City of New York; Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, A. D. 1900.

The above-entitled original action was commenced on the 13th day of December, A. D. 1893, and the petition of Samuel Hunt, as

receiver was filed in said cause on the 28th day of May, 1900, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, and orders of the court were made and entered in the order and on the dates hereinafter stated, to wit:

2 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents. } No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY o New York; Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

To the circuit court of the United States for the northern district of Ohio, western division:

The petition of Samuel Hunt, as receiver of the property of the respondent, Toledo, St. Louis and Kansas City Railroad Company, duly appointed in the above-entitled cause, respectfully shows as follows:

First. Prior to 1886, the Toledo, Cincinnati and St. Louis Railroad Company a consolidated corporation under the laws of Ohio, Indiana and Illinois owned and operated a narrow-*guage* line of railway extending from Toledo, Ohio to East St. Louis, Illinois. The road consisted of two divisions; the Toledo division, extending from said Toledo, to Kokomo, Indiana, and the St. Louis division extending from said Kokomo to said East St. Louis. Each division was subject to divisional mortgages. Default having been made in the conditions of the divisional mortgages, proper actions were instituted for the foreclosure of these mortgages, and on December 30th, 1885, the Toledo division was sold to Sylvester H. Kneeland under decrees entered in the circuit court of the United States for the district of Indiana, the court of primary jurisdiction, and in the circuit court of the United States, for the northern district of Ohio, foreclosing the first mortgage thereon made by the Toledo, Delphos and Burlington Railway Company, one of the constituent companies of said Toledo, Cincinnati and St. Louis Railroad Company, and on the same day, the St. Louis

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division was also sold to said Kneeland under decrees entered in the circuit court of the United States for the district of Indiana, the court of primary jurisdiction, and in the circuit court of the United States for the southern district of Illinois foreclosing mortgages thereon made by the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, another of said constituent companies.

After finding that the mortgage thereby foreclosed constituted a paramount lien on the property embraced therein, subject only to such court and receiver's indebtedness as had theretofore been or might thereafter be decreed to be prior in equity to the lien of said mortgage and after the usual provisions for the sale of the mortgaged railroad at not less than the upset price fixed by such decree, a specified portion whereof was to be paid in cash, each decree provided that within twenty days from and after the confirmation of the sale thereunder, the purchaser should pay of the unpaid purchase-money for which said mortgaged property was sold, a sum sufficient, taken with the cash payment to be made at the time of sale, to pay and discharge the court costs, the master's fees, solicitors' fees, counsel fees and the claims and debts, including the taxes legally due upon the mortgaged property, that should have been then and prior thereto found and determined, and finally adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of the mortgage thereby foreclosed, excepting such final decrees upon said claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment by such purchaser, such purchaser should be let into the possession use and enjoyment of said rail-
4 road and property purchased at said sale, subject to the stipulations thereinafter set forth, that, upon confirmation of the sale made under said decree and payment within twenty days thereafter of such part of the purchase-money as might be required fully to comply with said provisions of said decree, the masters named therein should deliver to such purchaser a deed of conveyance of the mortgaged railroad and property; that said deed should contain an express stipulation reserving to the court, and the court reserved, full power and jurisdiction over said mortgaged property, with full authority and power, upon default of the purchaser in complying with each and every of the requirements of said decree respecting payment of the purchase-money, to retake possession of said railroad and property, and forthwith sell the same, or any part thereof, on order of the court to that effect entered; that said deed should contain the further stipulation that the purchaser and his assigns should forthwith yield possession of said railroad and property upon such order of the court entered upon such default of the purchaser in the payment of purchase-money as by the order of the court required, and that, upon delivery of said deed by the masters to such purchaser such purchaser should be let into possession of the mortgaged property.

Each of said decrees further provided that the residue of the pur-

chase-money not required to make the payments above stated should be paid by the purchaser from time to time upon the amounts found and determined, and finally adjudged by the court to be due and payable upon court and receiver's indebtedness, and to be prior and superior to the lien of the mortgage thereby foreclosed, said payments to be made by the purchaser upon twenty days' notice by the masters, upon the order of the court to that effect entered requiring such payment, until the entire purchase-money should be exhausted, if it should require the entire purchase-money to pay and discharge said court and receiver's indebtedness, and that, if any surplus be left after the payment of the court and receiver's indebtedness, the same should be distributed *pro rata* upon the coupons and bonds of said mortgage until the same should be fully paid; that in making payment of any order or decree decreeing any specified sum to be due and payable upon any claim or debt adjudged due and payable as part of the court and receiver's indebtedness against said property, the purchaser should have the right to pay said decree by furnishing to the masters evidence that such purchaser was the owner of such claim or debt, and had authority to enter the same satisfied and discharged.

It was also provided that the purchaser or purchasers at the foreclosure sale reserved the right to appeal from any order or final decree made by the court decreeing the payment of claims adjudged to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the mortgage in suit.

Said sales were duly confirmed on February 5, 1886, and thereafter and on March 10, 1886, by order of the said circuit court for the district of Indiana, entered on that day, the form of the proposed master's deed was approved and its delivery directed.

The order further provided that said deed be confirmed and delivered, with the express understanding that the court have and retain full power and authority to retake possession of said property, or any part thereof, if the said grantee fail to pay the full purchase-money according to the terms of the decrees of sale, and that, in case any appeal be taken from any decree for the payment of money by said grantee and supersedeas bond be given, the amount secured by such bond should be considered as a part of the purchase-money, to enforce the payment of which the court might retake the property or any part thereof.

Pursuant to said order and on said March 10, 1886, a master's deed of the property was delivered to the purchaser. Said deed contained the following clause:

"It is hereby stipulated that the court shall have and hereby does reserve full power and jurisdiction upon default of the said Sylvester H. Kneeland, to comply with any order of the court respecting payment of the purchase-money, to retake possession of said property, and forthwith sell the same or any part thereof upon order by the court to that effect entered; and the said grantee further stipulates that he and his assigns will forthwith yield possession of said railroad and property upon such order of the court entered on his default in the payment of the purchase-money

or any part thereof, as required by said decrees; and further that all money becoming due on appeals to the supreme court shall be deemed to be purchase-money, notwithstanding said decrees may have been superseded pending such appeal."

Second. Pending said foreclosure, an agreement of reorganization had been made under date of April 9th, 1884, between certain mortgage bondholders and creditors of said Toledo, Delphos & Burlington Railway Company and certain mortgage bondholders and creditors of said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois and James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck; and under the terms of said agreement said Quigley, Pierce and Boardman were constituted a reorganization committee of said St. Louis Division bondholders, and said Quigley, Harbeck, and McNab were constituted a reorganization committee of said Toledo Division bondholders. For said Pierce one Warren D. Hobbs was thereafter duly substituted. A copy of said agreement is filed herewith marked A.

Third. The purchase of said divisions had been made by Kneeland under the terms of a memorandum dated December 18, 1885, between said Kneeland and said Quigley as chairman of said committees pending the settlement of a formal contract with Kneeland. A copy of said memorandum is filed herewith marked B.

Fourth. Subsequent to said foreclosure sales, Kneeland entered into two agreements for the reorganization and reconstruction of said lines of railroads so purchased by him, each dated January 23rd, 1886, the first with said Quigley, Boardman and Hobbs, said reorganization committee of the St. Louis Division bondholders; the
7 other with said Quigley, Harbeck and McNab, said reorganization committee of the Toledo Division bondholders. Copies of each of said agreements are filed herewith marked, respectively, C and D.

Fifth. Accordingly, and in pursuance of these agreements, the Toledo, Dupont and Western Railway Company was organized under the laws of the State of Ohio with a capital stock of $3,500,000; the Bluffton, Kokomo and Southwestern Railroad Company under the laws of the State of Indiana, with a capital stock of $4,277,500, and the Toledo, Charleston and St. Louis Railroad Company under the laws of the State of Illinois, with a capital stock of $4,432,500.

Sixth. On the organization of said companies, said Kneeland entered into a contract with each of them in substantially the same terms, and by each of said contracts Kneeland agreed to convey to the company party thereto the line of railroad and appurtenant property in the State in which said company had been incorporated, and to cause the other two companies so organized to consolidate with the company party to said agreement, and further agreed, in consideration of the securities to be issued by the consolidated company other than its common capital stock, that said consolidated company should within a reasonable time broaden the *guage* of the entire line from Toledo to East St. Louis and make the same a first-class standard-*guage* railroad and equip the same accordingly. In consideration of said agreement on the part of Kneeland and of such

conveyance to the corporation, party to said agreement, of said line of railroad forming the subject of said agreement, the company, party to said agreement, to deliver to Kneeland all its common capital stock, except the shares qualifying directors and as and for a further consideration for said purchase and conveyance, agreed that as soon as practicable after the contemplated consolidation should have been effected, the consolidated company should execute and issue in full and complete payment of the purchase price of said railroad and property and in full and complete payment for
8 such broadening of and the construction and equipment of the line of road of the consolidated companies and for the purpose of exchanging some of said stock and securities with the holders of certain securities issued by the companies theretofore owning and controlling said railroad and property, or portions thereof and for the payment of certain debts underlying certain rights of way and other proper corporate purposes the following securities:

(*a.*) An amount of fully paid capital stock of said consolidated company equal to the aggregate amount of the common capital stock of its three constituent companies.

(*b.*) $5,805,000.00 fully paid preferred convertible stock.

(*c.*) $9,000,000.00 first-mortgage six per cent. gold bonds with interest payable semi-annually and maturing within thirty years.

A copy of said agreement with the Ohio company is filed herewith marked E. The agreement with the Indiana company and with the Illinois company are respectively *mutatis mutandis* in the same form.

Seventh. Upon the execution of said contracts, Kneeland, by proper deeds, conveyed to the Ohio company said line of railroad in Ohio, to the Indiana company said line of railroad in Indiana, and to the Illinois company said line of railroad in Illinois. The consideration for such conveyance expressed in the deeds was, in the case of the Ohio company, its capital stock to the par amount of $3,499,400; in the case of the Indiana company, its capital stock to the par amount of $4,277,500, and in the case of the Illinois company, its capital stock to the par amount of $4,472,500. This stock was thereupon issued to Kneeland full paid.

Eighth. Thereafter, and on June 12th, 1886, said companies entered into articles of consolidation, which were duly filed
9 and recorded, and under which the above-named respondent Toledo, St. Louis and Kansas City Railroad Company was formed. The articles of consolidation, after reciting proper corporate action for the issue by said respondent railroad company of said preferred stock and of its six per cent. thirty-year gold coupon bonds to be secured by a first mortgage on its line of railroad and franchises, acquired and to be acquired, provided that the capital stock of the consolidated company, said respondent, should be $18,055,000, of which $12,250,000, the aggregate of the capital stock of the constituent companies, should be common stock; that said common stock should be issued in exchange share for share for the stock of the constituent companies, and that the directors and proper officers of the consolidated company should have power to

issue said preferred stock and said bonds and execute and deliver said first mortgage.

Ninth. Immediately upon such consolidation and on or about said June 12th, 1886, said respondent, Toledo, St. Louis and Kansas City Railroad Company said consolidated company formed under said articles of consolidation, authorized the execution and delivery of its said first mortgage and the issue of its said first-mortgage bonds described in said articles of consolidation and also authorized the issue of its said preferred and common stock and issued the same.

Said Toledo, St. Louis and Kansas City Railroad Company thereupon and on or about the 19th day of June, 1886, duly made and executed under its corporate seal and attested by the signatures of its president and secretary its $9,800,000 bonds bearing date the first day of June, 1886, and by the terms of each thereof said obligor promised to pay to the holder thereof, at the agency of said obligor in the city of New York the sum of $1,000 in gold coin, of the United States of the then present standard of weight and fineness on the first day of June, 1916, and to pay interest on said principal sum, semi-annually at its agency in the city of New York, in like gold coin, at the rate of six per cent., per annum from the first day of June, 1886, on the first days of June and December in each year until the payment of said principal sum, on presentation and surrender of coupons for such interest annexed to said bonds as said coupons should severally become due. To secure the payment of said bonds and the coupons thereto attached, said railroad company on or about said 19th day of June, 1886, duly acknowledged and delivered to the American Loan and Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and Joseph E. McDonald, of the city of Indianapolis and State of Indiana, its certain indenture of mortgage or deed of trust, hereinafter called the first mortgage of said railroad company, and thereby conveyed to said trust company and said McDonald, upon the trusts therein stated, the line of railroad and other equipment and property therein specifically described. Said first mortgage was forthwith duly recorded in the proper offices. A copy of said first mortgage is annexed to the bill of complaint of the above-named complainant, Continental Trust Company of the City of New York, in this cause, and to it, for its contents your petitioner refers.

Tenth. Said first-mortgage bonds of the Toledo, St. Louis and Kansas City Railroad Company to the par amount of $9,000,000 and its said common stock to the par amount of $11,250,000, were, on the issue thereof delivered to Isaac W. White and Robert G. Ingersoll, trustees appointed under the two agreements dated January 23rd, 1886, for payment out and delivery by said trustees in accordance with the terms of said agreements, and from time to time after the deposit with said trustees of said first-mortgage bonds and said common stock, deliveries were made by said trustees under the provisions of said agreements of January 23rd, 1886.

Eleventh. Subsequent to said June 19, 1886, sundry disputes and

controversies arose between said Kneeland and said Toledo, St. Louis and Kansas City Railroad Company and on or about June 1st, 1891, an agreement bearing date on that day was made between said railroad company and said Kneeland, a copy of which is filed herewith marked F. To said agreement, said Quigley, Boardman and Hobbs, said reorganization committee of the St. Louis Division
11 bondholders, and said Quigley, Harbeck and McNab said reorganization committee of the Toledo Division bondholders, assented, and each of said committees approved said agreement of settlement Exhibit F, by assents thereto, copies of which are filed herewith, marked respectively G and H.

On June 3rd, 1891, said railroad company and said Kneeland entered into a further agreement bearing date on that day, supplemental to said agreement between them of June 1, 1891. A copy of said supplemental agreement is filed herewith marked I. To said supplemental agreement of June 3, 1891, each of said reorganization committees assented in writing. Copies of such assents are filed herewith, marked respectively J and K.

Twelfth. At the time of the execution of said agreements of June 1st, 1891, and June 3, 1891, between said railroad company and said Kneeland, said Kneeland had not completed payment of the purchase price of said railroad and property purchased by him at said foreclosure sales of the Toledo division and of the St. Louis division of the Toledo, Cincinnati & St. Louis Railroad Company, and there were then outstanding, unpaid claims to the amount of $350,000 and upwards which under the terms of said foreclosure decrees had been contested by said Kneeland, and in respect of which a priority was claimed which, if finally established, entitled said claims to be paid out of the proceeds of said divisions, in priority to any distribution of said proceeds of sale, to the holders of the bonds secured by the mortgages foreclosed by the respective decrees under which said sales had been made, and said agreement of June 1st, 1891, so set forth.

By said agreement of June 1st, 1891, after providing for the disposition, in accordance with said agreement, of certain securities in the hands of said trustees under said agreements of January 23, 1886, the parties to said agreement of June 1, 1891, consented and requested said trustees to deliver all the rest and residue of the securities of the party of the first part thereto, said Toledo, St. Louis and Kansas City Railroad Company, which should remain in the hands of said two trustees, to the Farmers' Loan and Trust Company of the City of New York, upon the execution by said trust
12 company, of a declaration of trust to the effect that it agreed to receive and hold such securities in accordance with said trust, and that said trust company should thereupon hold the same in trust as security for the payment of all purchase-money under said foreclosure sale due from said Kneeland, to the extent of all claims upon the proceeds of said sale which were prior to the claims of said first-mortgage bonds of said Toledo, Delphos and Burlington Railway Company of Ohio and Indiana, and said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois,

and upon the further trust to pay over and deliver said securities to said Kneeland as fast as he should pay said claims against said proceeds of the foreclosure sales in the manner and at the rate in said agreement provided.

Thereafter and in pursuance of said agreement, said Farmers' Loan and Trust Company executed at the foot of said agreement of June 1, 1891, a declaration of trust as therein provided, and which is set out at the foot of Exhibit F, hereto, and which was agreed to and specially approved in writing by the parties to said agreement.

Thirteenth. Thereafter and in pursuance of said agreement of June 1st, 1891, the trustees under said agreements of January 23, 1886, delivered to said Farmers' Loan and Trust Company the following securities to be held by it under said declaration of trust, to wit:

$16,000 first-mortgage bonds of said Toledo, St. Louis and Kansas City Railroad Company, bearing the coupon maturing June 1st, 1891, and subsequent coupons; $117,000 first-mortgage bonds of said Toledo, St. Louis and Kansas City Railroad Company, bearing the coupon maturing December 1st, 1891, and subsequent coupons; $25,000 first-mortgage bonds of said Toledo, St. Louis and Kansas City Railroad Company bearing the coupon maturing June 1st, 1893, and subsequent coupons; $500,000 preferred stock of said railroad company and $1,169,000, common stock of said railroad company.

Thereafter and in or about the month of June 1893, said Isaac W. White, one of the trustees under said agreement of January 23, 1886, surrendered to said Farmers' Loan and Trust Company,
13 to be held by it for the purposes and in pursuance of said agreement of settlement of said declaration of trust, first-mortgage bonds of said Toledo, St. Louis and Kansas City Railroad Company to the amount at par of $26,000, bearing coupon maturing June 1st, 1893, and all subsequent coupons. Said bonds so delivered by said White were part of 55 bonds appropriated by the trustees under said agreements of January 23, 1886, for their compensation, 33 of which had been taken by said White.

Fourteenth. Said Farmers' Loan and Trust Company has, since the respective deliveries thereof to it as above set forth, held and now holds said first-mortgage bonds to the par amount of $158,000 with coupons as aforesaid, said $500,000 par value of said preferred stock and said $1,169,000 par value of said common stock of said Toledo, St. Louis and Kansas City Railroad Company, under the terms of said declaration of trust.

Fifteenth. On or about the 18th day of May, 1893, Joseph S. Stout, and Randolph F. Purdy, filed their bill in this court against said Toledo, St. Louis and Kansas City Railroad Company for a particular statement of the contents whereof the petitioner prays leave to refer to said bill, of record in this court, and thereafter filed similar bills in the circuit court of the United States for the district of Indiana and in the circuit court of the United States for the southern district of Illinois. Thereafter, and on or about the 18th day of May, 1893, by an order of this court duly entered on said bill, and

by order of said circuit court for the district of Indiana and the southern district of Illinois, respectively entered on the said bills therein, Samuel R. Callaway was duly appointed receiver of said Toledo, St. Louis and Kansas City Railroad Company and all its property, and thereafter duly qualified as such.

Thereafter, said Toledo, St. Louis and Kansas City Railroad Company made default in the payment of the interest on said first-mortgage bonds which matured and became due and payable on the 1st day of June, 1893, and thereafter and on or about the 16th day
14 of December, 1893, Continental Trust Company of the City of New York, and John M. Butler, who had theretofore been duly substituted as trustees under said first mortgage, in the place and stead of said American Loan and Trust Company and said Joseph E. McDonald, filed their bill in this court and in said circuit court for the district of Indiana and said circuit court for the southern district of Illinois, praying for the foreclosure of said first mortgage. For the contents of said bill in this court, petitioner prays leave to refer to the original bill in this cause of record in this court. Thereupon, said Samuel R. Callaway was also appointed receiver under said bills of foreclosure by said courts respectively, and by orders entered in each of said causes, and said action of Stout and Purdy was consolidated with said action of foreclosure under the title of said action of foreclosure.

Sixteenth. Your petitioner is and has been since about the first day of December, 1898, receiver of said Toledo, St. Louis and Kansas City Railroad Company and of all its property duly appointed in succession to R. F. B. Pierce, who was appointed in succession to Daniel D. Davis, who was appointed in succession to said Samuel R. Callaway, by orders of each of said circuit courts respectively, entered in said causes, and the petitioner on his appointment duly qualified as such receiver, and has since been and now is in possession of said railroad and property.

Seventeenth. Notwithstanding said agreement of settlement of June 1st, 1891, said Kneeland failed thereafter to make payment of the unpaid residue of the purchase price of said railroad and property purchased by him at said foreclosure sales of the Toledo division and of the St. Louis division of the Toledo, Cincinnai and St. Louis Railroad Company, although claims were established in said foreclosure actions to the amount of upwards of $350,000 in respect of which a priority was adjudged for payment out of the proceeds of sale of said divisions, before any distribution of said proceeds of sales to the holders of said bonds secured by the mortgages foreclosed by the respective decrees under which said sales had been made.

15 By an order of this court entered in this cause on the 7th day of February, 1898 upon the petition of R. F. B. Pierce, then receiver of said respondent Toledo, St. Louis and Kansas City Railroad Company and of its property, notice of the presentation and prayer of which, and of the hearing thereon, had been given to all the parties to the above-entitled cause this court found that there

was due in respect of said prior claims and decrees the following amounts:

1. To the American Surety Company, of New York, $323,909.99, and interest thereon from the 1st day of July, 1894, at the rate of six per cent. per annum.

2. To the Northern National Bank of Toledo, Ohio, and others whose claims were held by said bank, $107,935.33, and interest thereon from the 1st day of January, 1898, at the rate of six per cent. per annum.

3. To the State Trust Company of New York, $52,247.30, and interest thereon from the 1st day of January, 1898, at the rate of six per cent. per annum, and that the holders of said claims and decrees were entitled to the payment thereof out of the property embraced in said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, in priority to said mortgage, and to the rights of the holders of the bonds and coupons issued thereunder and secured thereby, and by said order said receiver was directed to take up said claims and decrees and to pay therefor said amount thereof with interest, and for that purpose was authorized to apply out of the moneys arising from the operation of the railroad and property embraced in said first mortgage of said respondent railroad company, the sum of $125,000. It was further provided by said order that for the residue of the amount necessary to take up said claims and judgments with interest as aforesaid, receiver's certificates be issued to the amount of $430,000, and said receiver was authorized to dispose of said certificates in accordance with said order, and, by said order, said certificates were made a first and best lien upon all the property and assets of said respondent Toledo, St. Louis
16 and Kansas City Railroad Company, of every nature and description, wheresoever situated, then in the possession of this court and paramount and superior to the lien thereon of said first mortgage of said respondent railroad company, and to all liens subsequent thereto, and to all rights and claims therein of any party to the above-entitled cause, or represented by any party to the above-entitled cause, and that the same should be paid out of the proceeds of sale of said mortgaged premises, unless sooner paid, and might also be paid out of any funds arising from the operation of said mortgaged railroad and property available for that purpose. For the precise contents of said order the petitioner prays leave to refer to the original order entered in this cause, of record in this court. Similar orders were also entered in the circuit courts of the United States for the district of Indiana and for the southern district of Illinois, respectively in said actions of foreclosure pending therein.

In pursuance of said orders said receiver took up said claims and decrees and paid therefor the sum of $555,759.42, the amount thereof with interest thereon, as found and decreed to be due by said orders. Said payment was made by said receiver out of the moneys in his hands arising from the operation of the railroad and property embraced in the first mortgage of said respondent railroad company, and by the issue, in accordance with the said orders, of receiver's certificates to the aggregate amount of $430,000 in the form therein

set out, and with the effect and secured by the lien in said orders provided.

Between July 1st, 1893, and July 1st, 1894, the receiver in this cause had paid, under orders of court in respect of said claims of American Surety Company, interest thereon quarterly at the rate of six per cent. per annum and in respect of said claims of the Northern national bank and others whose claims were represented by said bank and in respect of said claims of the State Trust Company interest thereon quarterly at the rate of six per cent. per annum.

17 Between July 1st, 1894, and January 1st, 1898, the receiver in this cause, under orders of this court duly made and entered, further paid in respect of said claims of the Northern National Bank of Toledo, Ohio, and others, whose claims were represented by said bank, interest quarterly on said sum of $107,935.33, from July 1st, 1894, to January 1st, 1898, at the rate of six per cent. per annum, and, in respect of said claims of the State Trust Company of New York, interest quarterly on said sum of $52,247.30, from the 1st day of July, 1894, to January 1, 1898, at the rate of six per cent. per annum.

For the contents of said orders the petitioner prays leave to refer to the original orders of record.

Of said receiver's certificates so issued, certificates to the amount of $400,000, together with interest on said entire issue from time to time outstanding, have been paid in accordance with the terms of said certificates by the receiver for the time being of said Toledo, St. Louis and Kansas City Railroad Company out of the moneys in his hands arising from the operation of said mortgaged railroad and property, and by the decrees of foreclosure hereinafter mentioned, said receiver's certificates remaining outstanding, are required and directed to be paid out of the proceeds of sale of the property embraced in said first mortgage of said respondent, Toledo, St. Louis and Kansas City Railroad Company, unless sooner paid out of the funds arising from the operation of the mortgaged property.

Eighteenth. On or about April 1, 1898, a decree was duly entered in this cause foreclosing said first mortgage of said respondent railroad company and directing a sale of the mortgaged premises. For the contents of said decree, the petitioner prays leave to refer to the original decree, of record in this court in this cause. Decrees of similar effect were thereupon duly entered in said actions pending in the district of Indiana and in the southern district of Illinois.

Said decree of foreclosure and sale entered by this court having been duly affirmed by the United States circuit court of ap-

18 peals for the sixth circuit on appeals prosecuted to said court, said mortgaged premises were, in pursuance of said decrees of foreclosure, sold on the 27th day of March, 1900, to Morton S. Paton and Richard B. Hartshorne for the sum or price of $12,200,000, and said sale was by order of this court entered April 18, 1900, by order of the said circuit court for the district of Indiana, entered April 23, 1900 and by order of the circuit court for the southern district of Illinois, entered April 23, 1900 duly confirmed

and made absolute. For the contents of said order of confirmation in this court, petitioner prays leave to refer to the original thereof, of record in this cause.

Nineteenth. At the time of said sale, there was due in respect of said first-mortgage bonds and coupons of said Toledo, St. Louis and Kansas City Railroad Company, approximately the sum of $13,500,000, and the dividend to which any such bond with the coupon maturing June 1, 1893, and subsequent coupons, will be entitled out of the proceeds of sale, as the petitioner is informed and believes, will not exceed the sum of $1,260.

Twentieth. By the terms of said decrees of foreclosure and sale hereinabove set forth, it is adjudged that said first mortgage of said respondent railroad company is a lien upon all moneys, profits and income derived by any receiver in said causes from the operation of said mortgaged railroad and property, and all said amounts which have been so paid in taking up said prior claims and decrees, have been so paid or will be paid either out of said mortgaged premises or out of moneys derived by the receiver from the management and operation thereof.

Twenty-first. The petitioner is informed that said preferred stock and said common stock of said Toledo, St. Louis and Kansas City Railroad Company have no value.

The petitioner, therefore, prays the decree of this court that the petitioner is entitled, out of said first-mortgage bonds and said
19 preferred stock and said common stock in the hands of said Farmers' Loan and Trust Company, to be reimbursed all said amounts with interest thereon from the respective dates of payment thereof, which by the petitioner and by his predecessors in the receivership in this cause of said Toledo, St. Louis and Kansas City Railroad Company, have been paid in respect of said prior claims, whether for principal or interest; that said securities, towards satisfaction thereof, be delivered to the petitioner, to be by him delivered, as part of the mortgaged premises, to the purchasers of the mortgaged premises, at said sale thereof, made under said decrees of foreclosure of said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, or that said securities be sold and the proceeds thereof, paid to your petitioner, for payment by him to said purchasers of the mortgaged premises or be paid to said purchasers, and for such other and further relief as may be just.

BROWN & GEDDES,
Solicitors for Petitioner.

CLARENCE BROWN, *Of Counsel.*

UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*
County of Lucas,

Samuel Hunt, being duly sworn, deposes and says: I am the petitioner named in the foregoing petition. I have read the foregoing petition and know the contents thereof, and the same is true to the best of my knowledge information and belief.

SAMUEL HUNT.

Sworn to before me this 28th day of May, 1900.
[SEAL.] NEIL McKINNON,
Notary Public, Lucas County, Ohio.

(Endorsement:) Filed. May 28, 1900. Irvin Belford, clerk.

20 "A."

EXHIBIT No. 210. Dec. 1, 1896. Irvin Belford, Special Master.

An agreement by and between the mortgage bondholders and creditors of the Toledo, Delphos & Burlington Railroad Company and mortgage bondholders and creditors of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, hereinafter mentioned *inter sese*, party of the first part, hereinafter for brevity called the creditors, and James M. Quigley, Charles W. Pierce and Halsey J. Boardman, John McNab, Charles T. Harbeck, also bondholders and creditors of the corporations above named, parties of the second part, for brevity hereinafter called the trustees.

Whereas, the Toledo, Delphos and Burlington Railroad Company a corporation existing under the laws of the respective States of Ohio and Indiana, did on or about the 17th day of January, 1880, execute and deliver to the Central Trust Company of the City of New York, its certain mortgage or deed of trust of all its property and franchises, including its line of railroad extending from Toledo, in the State of Ohio, to Kokomo, in the State of Indiana, a distance of about one hundred and eighty-five miles, to secure the payment of its first-mortgage bonds to the amount in the aggregate of one million, two hundred and fifty thousand dollars, the said bonds bearing date the first day of January, 1880, each for the sum of one thousand dollars, payable on the first day of January, 1910, with interest payable in the meantime semi-annually, at the rate of 6% per annum, on the first days of January and July of each year.

21 And whereas, the said company did, under the same date, execute and deliver its certain other deeds of trust or mortgage, subject, however, to the mortgage above mentioned, to secure the payment of certain other bonds of the said company, called income bonds, to the amount in the aggregate of one million two hundred and fifty thousand dollars.

And whereas, the said company did, on or about the 21st day of June, 1889, execute its mortgage or deed of trust, known as the terminal trust mortgage, to secure bonds of the said company known as terminal trust bonds, to an amount in the aggregate of two hundred and fifty thousand dollars, bearing six per cent. interest, payable semi-annually, the principal being payable on the first day of July, 1910.

And whereas, the said company did also create and issue its capital stock to an amount in the aggregate of about four million dollars;

And whereas, the said company did make default, on or about the 1st day of January, 1883, in the payment of interest upon the

mortgage bonds herein first above mentioned, and therefor actions for the foreclosure of the said mortgage were brought against the said company by the said Central Trust Company, trustee, in the circuit court of the United States, for the northern district of Ohio, western division, and in the circuit court for the district of Indiana, which actions are now pending;

And whereas, the said company and certain other railroad corporations were, after the execution of the said mortgages and issue of the aforesaid bonds and shares, consolidated under the name of the Toledo, Cincinnati and St. Louis Railroad Company;

And whereas, the said Toledo, Delphos and Burlington Railroad Company and the said Toledo, Cincinnati and St. Louis Railroad Company are insolvent, and it is necessary to prosecute the beforementioned actions to decrees of foreclosure and sale in order to avail of the mortgage security;

And whereas, the Toledo, Cincinnati and St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, claiming to own and operating a line of railroad extending from Kokomo, aforesaid, through the States of Indiana and Illinois, to East St. Louis, in the State of Illinois, a distance of about two hundred and sixty-eight miles, and known as the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, did, on or about
22 the 23rd day of July, 1881, execute and deliver to the said Central Trust Company, as trustee, a mortgage or deed of trust, to secure its bonds, to an amount in the aggregate of three million dollars, known as first-mortgage bonds, dated July 23, 1881, payable in forty years, with interest at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July in each year;

And whereas, the said last-mentioned company did, on or about the same date, also execute and deliver to the said Central Trust Company, trustee, its mortgage or deed of trust, subject to the mortgage last above mentioned, to secure a further issue of its bonds, known as income bonds, to the amount of three million dollars;

And whereas, the said Toledo, Delphos and Burlington Railroad Company and the said Toledo, Cincinnati and St. Louis Railroad Company after the issue of the bonds and shares above mentioned, and about the 25th day of February, 1882, were, together with certain other corporations, consolidated under the name of the Toledo, Cincinnati and St. Louis Railroad Company, and thereafter such last-mentioned consolidated company created and issued its bonds, called debenture bonds, to the amount of about four hundred and sixty thousand dollars in the aggregate, and also certain other obligations;

And whereas, the said Toledo, Cincinnati and St. Louis Railroad Company and certain other corporations were, on or about May, 1883, consolidated under the name of the Toledo, Cincinnati and St. Louis Railroad Company, hereinafter called the consolidated company, and did create and issue (as is supposed) about nineteen million dollars of common capital stock, and about two million eight hundred and fifty thousand dollars of preferred stock;

And whereas, the said last-mentioned Toledo, Cincinnati and St. Louis Railroad Company did make default in the payment of interest on its first-mortgage bonds on the first day of January, 1883, and thereafter an action was brought in the said circuit court of the United States for the district of Indiana, for the foreclosure of the said mortgage, which action is still pending;

And whereas, said last-mentioned corporation, mortgagor, and the said consolidated company, are both insolvent;

And whereas, the railroad of the Toledo, Delphos and Burlington Railroad Company, the mortgagor first mentioned, connected with the railroad of the Toledo, Cincinnati and St. Louis Railroad Company at Kokomo, aforesaid, and the two lines of road so con-
23 nected constitute a through line of road, extending from Toledo to East St. Louis, aforesaid;

And whereas, the value and earning power of the roads and franchises aforesaid, as well as their utility to the public, is mainly dependent upon unity of ownership and management, and the parties to this agreement, mortgage bondholders and creditors of the said corporations respectively, of the class and to the amount set opposite their respective names, have a common interest in bringing about such unity of ownership and management, on the basis and by the means hereinafter specified, as near as may be;

Now, therefore, this agreement witnesseth:

First. That the creditors, parties of the first part, have constituted, and do hereby constitute, the said trustees, parties of the second part, their trustees, attorneys and agents, for all and singular the objects and purposes hereinafter specified, and do declare that the powers and authority hereby conferred are coupled with an interest in the said trustees and are irrevocable. And for such objects and purposes the said creditors, and each of them, shall and will, upon the signing of this agreement, respectively deposit their bonds and evidences of debt, with the Metropolitan Trust Company of New York City, unconditionally, subject to the demand, order and disposition of the said trustees, pay the sums of money and do all other acts and things hereinafter and in the succeeding plan of organization, part thereof, specified to be done at and after the signing of this agreement.

Second. The said trustees shall proceed, with all convenient speed, to make themselves or other parties to this agreement, holders of the mortgage bonds of the said Toledo, Delphos and Burlington Railroad Company, parties to the pending actions for a foreclosure of the mortgage of that company, and also to make themselves, or other parties to this agreement, holders of the mortgage bonds of the said Toledo, Cincinnati and St. Louis Railroad Company, parties to the pending suits for the foreclosure of the mortgages of that company. The said trustees, in co-operation with the trustees of the said several mortgages, or otherwise, as the case may require, shall conduct and prosecute the said foreclosure suits, with all convenient speed, to decrees and judgments of foreclosure and sale, and cause the mortgaged property and franchises to be exposed for sale at public auction according to law. The said trustees

may and shall commence and prosecute all such new suits and actions in their own name or the names of creditors, &
24 parties hereto, as they may be advised are necessary and proper (1) to settle and determine all questions affecting the title of the mortgaged premises above mentioned, or any part thereof, in order that a clear and good title may be conveyed to the purchaser at the foreclosure sales of the mortgaged premises; (2) for the enforcement of any liens, trusts or equities of whatever kind existing in favor of the creditors against any person, persons, or corporations whatsoever; (3) to prevent any breach of trust or to recover for any breach of trust heretofore committed by any person, persons or corporations, affecting the rights of the creditors; and the trustees may settle, compromise and adjust all such suits and actions upon such terms as they may deem proper. And the trustees may settle, compromise and adjust without suit, in their discretion, any and all claims and demands affecting the interests of the parties hereto in the premises, or relating to the properties and franchises herein referred to, or to any part thereof.

Third. At the foreclosure sale or sales under the mortgage or mortgages of the said Toledo, Delphos and Burlington Railroad Company and under the mortgage or mortgages of the said Toledo, Cincinnati and St. Louis Railroad Company, hereinbefore referred to, the trustees, by themselves or their agent or agents, shall buy the railroad property, and franchises exposed for sale, provided the means placed at their disposal by creditors are sufficient to enable the trustees to make such purchases; and the title acquired by such purchases shall be held and dealt with for the purposes of this agreement and the trusts herein declared, and for no other purpose.

Fourth. The trustees shall pay for the property and franchises so purchased, as far as may be practicable, with the bonds of creditors to be deposited as before mentioned, subject to the trustees' order and disposition, and, so far as necessary, with any moneys paid in under this agreement, as hereinafter provided for; and any additional sums of money that the trustees may require for such purchase or for the payment of receiver's indebtedness, costs, liens, charges and expenses of any and every kind, whatsoever, the trustees may raise by imposing in such way, manner and form as they in their sole discretion may think best, a fair, just, ratable and equal lien and charge upon all the securities deposited by the creditors, and, by way of anticipation upon all new securities to which the creditors may be entitled under this agreement, and upon the first-mortgage bonds of the new corporation to be created as hereinafter provided. Such charge
25 and lien shall be so arranged and so worked out as ultimately to fall with substantial equality upon the individual interests of creditors; and subject to this provision the trustees shall have full and absolute discretion in the premises. The trustees shall not be bound or obliged to make such purchase, as aforesaid, or any one or more of such purchases, if, in consequence

of unforeseen events and obstacles, it shall appear to them impracticable to carry out the main objects and purposes of this agreement, nor unless they shall be possessed, by the deposit of bonds and money by parties to this agreement and the moneys they may be able to raise in the way above specified, of sufficient means to enable them to make such purchases or any one of the contemplated purchases, but in that case the bonds and money of the creditors, not used, shall be returned to the creditors, together with any interest which may have been allowed thereon; it being understood and agreed that all moneys paid in, other than that paid in on subscription for new shares, is subject to the disposition of the trustees for current expenses, and that the money subscribed for new shares can only be used as part of the purchase-money.

Fifth. If the trustees shall purchase the several mortgaged railroads and properties, with their franchises and appurtenances, hereinbefore mentioned, and all of the same, at the foreclosure sale thereof as herein contemplated, they shall thereafter, with all convenient speed and with due regard to the laws of the respective States in which said railroads and property or part thereof are situated, organize a corporation, under such name as they may adopt, to take title to all the railroads and properties so purchased, with franchises, rights and appurtenances thereto belonging, and shall convey the same to such corporation in such way and manner as may be required by the laws aforesaid, in order to vest in said corporation a good title to the same and to every part thereof. And the said trustees shall cause the corporation so to be created to create and to deliver to them in payment for the property and franchises so to be conveyed, the bonds, shares and securities specified in the succeeding plan of organization which is to be taken as part hereof, and to do all and singular the acts and things hereinafter mentioned.

If, in order to ultimately vest all the property and franchises aforesaid in one corporation as hereby contemplated, it shall first be necessary to create separate corporations in the respective States aforesaid, to make separate conveyances, to such corporations, and then to consolidate the same, the trustees shall cause
26 such corporations to be created and consolidated, and shall do whatever they may be advised by counsel to be needful and proper in the premises to the end aforesaid.

Sixth. It is contemplated that it may not be lawful or practicable to cause the entire line or lines of railroad and the terminal property, together extending from Toledo to East St. Louis to be sold as an entirety at one public sale, and that it may be necessary to sell the roads of the respective companies above mentioned separately, under the respective mortgages of each company, and therefore, that it may happen that the said trustees, by reason of unforeseen obstacles and events, may be able to purchase one of the said lines of road and not the other. In that case the trustees representing, as hereinafter classified, that class of creditors directly interested in the property purchased may in their sole discretion do with the property so purchased whatever they shall deem to be for

the best interests of such creditors, being only bound to exercise good faith and their best judgment, and so to arrange that whatever is ultimately realized for such creditors, and in whatever form, shall be equally and fairly distributed among them; or the trustees may, in their discretion and upon such reasonable notice, by publication or otherwise, as they may determine, call a meeting or meetings in the city of New York or Boston of such of the creditors, parties hereto, as may be so interested in the property so purchased, in order to determine what disposition shall be made thereof; and a majority in interest of such first-mortgage bondholders at any such meeting or meetings shall determine and decide all questions submitted, and their decision shall be binding and conclusive upon all.

Seventh. The trustees shall have full power to settle, compromise, adjust and litigate all claims and demands of every kind and description, upon, against, or in favor of either of the said corporations, mortgagors or debtors, and the railroads and property hereinabove mentioned, or any part thereof, and the acts and doings of the said trustees, in the premises shall be conclusive and binding upon the creditors, parties of the first part, their successors and assigns.

In the event of a purchase by the trustees as herein contemplated, the trustees may, in their discretion, permit the property purchased to remain in the custody and operation of a receiver until the new corporation has been created and is ready to take the title to, or possession of the same; or the trustees, by themselves or their
27 agents, may take possession of the property meantime, in which latter case the trustees shall be fully indemnified by the creditors, parties of the first part, for all loss, cost and damage which the trustees may sustain, directly or indirectly, by reason of taking such possession, not incurred by reason or in consequence of their direct, personal and gross negligence.

Eighth. The trustees may in all cases act by a majority of their number, and they may delegate to any one of their number such power and authority in the premises, as they may think proper and the acts and doings of such majority, and of such trustee exercising delegated powers, shall have the same validity and binding effect as if done and performed by the whole body of trustees acting jointly. The trustees may also appoint one or more of their number to act as special representative or representatives of particular classes of creditors, parties hereto, but to which class such representative or representatives must also belong (although his or their interest need not be exclusively with that class), and the acts and doings of such class representative or representatives shall be absolutely binding and conclusive upon the class which he or they may be designated to represent. The trustees may also appoint and dismiss such agents from time to time, and confer upon them such authority, as they may think proper. Any and all vacancies occurring in the body of trustees, parties of the second part, from time to time, by death or any other cause or causes whatsoever may and shall be filled by the remaining trustees or trustee, and any successor or successors so appointed shall, upon being notified of such

appointment and accepting the same, in writing, at once and by mere force of such appointment and acceptance, and without further act or deed, become vested with all the power and authority, and subject to all the duties and responsibilities appertaining, under the terms thereof, unto his or their predecessors in the trust. Until and unless the trustees shall change the representation of the respective classes of the creditors in pursuance of the power above conferred, James M. Quigley, Halsey J. Boardman and Charles W. Pierce, and their successors shall be the trustees especially representing the creditors of the Toledo, Cincinnati and St. Louis Railroad Company, with power to fill vacancies in their number in the manner specified in the eighth paragraph hereof, and to act by a majority of their number and to delegate powers, as in the said paragraph is provided; and James M. Quigley, John McNab and Charles T.
28 Harbeck and their successors shall be the trustees especially representing the creditors of the Toledo, Delphos and Burlington Railroad Company, with like power to fill vacancies in their number, to act by a majority and to delegate powers as last above mentioned.

Ninth. The trustees shall create and issue their certificates for all bonds, and securities deposited with or for them in manner aforesaid, in suitable and proper form and so as to be convenient for transfer as may be, entitling the holder to the proper kind and amount of new securities when issued, and also receipts for all moneys paid in, to or for them; in all cases stating in their certificates and receipts that the bonds, shares, securities and moneys have been deposited and paid under the terms and provisions of this agreement. Every assignee of such certificate or receipt shall, for all the purposes of this agreement, be considered as standing in the place of the original assignor, and shall have no other or greater rights whatsoever in the premises. The trustees shall cause the new bonds and shares contemplated by this agreement to be executed and delivered to them with all convenient speed, and with like convenient speed they shall cause the same to be delivered to the parties entitled thereto in exchange for the trustees' certificates.

Tenth. Upon the creation and organization of the company that may be organized to take title to the property purchased by the trustees under the provisions of this agreement the trustees and the said company are hereby authorized and empowered to adjust and finally settle all the accounts of the trustees, to arrange and settle the amount of their compensation, and all questions arising out of the acts and doings of the trustees under this agreement; and the said corporation is authorized and empowered to give to the trustees a general and final release and discharge in the premises, which shall be binding and conclusive upon each and every one of the persons composing the party of the first part, their respective executors, administrators and assigns.

Eleventh. It is contemplated by the respective parties hereto, in the course of the execution of this agreement, questions, difficulties and obstacles will arise that cannot be foreseen and provided for, and that in order to effectuate the main purposes and objects of this

agreement, and at the same time to protect the trustees from a too onerous responsibility, it is necessary that the trustees should be invested with a large discretion. Therefore, it is further agreed that if, by reason of any fact or circumstance unforeseen or
29 unprovided for or any event hereafter occurring, it shall be impracticable to execute and carry out the provisions of this agreement, or any of them, literally and strictly, it shall not for any such reason be permitted to fail, but it shall be executed according to the substantial purpose and meaning thereof as interpreted by the trustees, and as near thereto as in their judgment may be reasonably practicable, and for this purpose the said trustees, preserving the order of rank and substantial rights of the several parties comprising the party of the first part as between themselves, shall have power to supply and remedy any defect in the said plan of organization that may hereafter appear; and they may exercise their discretion in respect of all matters not herein expressly provided for. The said trustees may and shall decide all questions that may arise as to the construction of this agreement, or any part thereof, and their decision shall be final and binding upon the creditors, parties of the first part. The said trustees shall not be jointly liable under this agreement, but each shall be liable only for his own willful default; nor shall either of them be responsible (while himself acting in good faith), for the acts or omissions of any agent, attorney or other person employed by them, or either of them.

Twelfth. The said Metropolitan Trust Company shall under this agreement and in respect of every matter and thing herein contemplated to be done by the said company, be liable only for its own good faith and reasonable diligence; and in respect to the disposition of the bonds and money that may be deposited with the said trust company, the order, receipts and acquittances of the said trustees, or either class of trustees, shall, in favor of the said company, be final and conclusive upon all parties hereto.

Thirteenth. If at any time before the purchase of both the railroads herein mentioned, for account of the parties to this agreement, for any reason, unity and harmony of action for bringing about in the manner herein contemplated, the uniting of the two properties mentioned should be found to be impracticable, this trust shall cease to be a joint trust for the bondholders and creditors of the abovementioned corporations, and shall become a separate trust for the benefit of each class respectively. The trustees for either class may notify the fact of such severance of the trust to the parties to this agreement, by publication in the press or otherwise, and to the Metropolitan Trust Company; and thereupon the bonds of the said Toledo, Delphos and Burlington Railroad Company, deposited by the holders and any unexpended balance of money paid in
30 by them in respect of such bonds and the deposit thereof, and the right to the possession thereof, shall immediately vest in the trustees for that class of bondholders; and the bonds of the Toledo, Cincinnati and St. Louis Railroad Company, deposited by the holders thereof, and any unexpended balance of money, paid in by them in respect of such bonds and the deposit thereof, and the

right of the possession of such bonds and balance shall immediately vest in the trustees for that class of bondholders. And in the event of such severance of the trust, the trustees for the respective classes above mentioned shall be governed by the provisions of the sixth paragraph hereof, as far as applicable to the case. Nothing in this agreement or in the plan of organization is to be construed as an admission as to rights of the several classes of persons constituting the parties of the first part as between themselves, except for the purpose of carrying out the plan of organization in its entirety on the basis of the general compromise and adjustment specified in the plan.

Fourteenth. For convenience, separate copies or duplicates of this agreement may be signed by the respective persons constituting the party of the first part with like effect as though all of said persons had signed one and the same original; and together the said copies or duplicates shall be considered as constituting one and the same instrument and agreement. The trustees may limit the time for assenting to, and signing, this agreement by those entitled to become parties thereto, to such period as they may think proper, and may, in their discretion, and from time to time, extend the time for such assent, and such limitation and extension may be by publication of such notice in the press or in such other way as the trustees may determine.

Plan for Organization.

First-mortgage bonds.—The new company to create and issue to the trustees bonds to the amount of $6,750,000, representing about $15,000 per mile of the whole line, to be secured by a first mortgage upon all its property and franchises; the bonds to be for $1,000 each, payable forty years after date, and bearing interest at the rate of six per cent., payable semi-annually. The trustees shall negotiate and sell so many of these bonds as may be necessary in order to raise money for the reconstruction of the line of railroad, including change of gauge, equipment, the acquisition of terminal facilities, and for other purposes mentioned in this agreement. An amount equal to two years' interest upon bonds actually sold shall be
31 set aside out of the proceeds of sale for the payment of such interest.

Second-mortgage bonds.—The new company to create and issue to the trustees second-mortgage bonds to the amount of $7,000,000, to be secured by a second mortgage of all its property and franchises; the bonds to be payable fifty years after date, bearing interest at the rate of four per cent. per annum from January 1, 1888, to January 1, 1893, and six per cent. per annum from that time until their maturity; and the said bonds and mortgage to contain a provision that the said mortgage shall not be foreclosed before 1890, unless in case of default in the payment of interest on the first-mortgage bonds, and in the event of such default the principal and interest of the second-mortgage bonds shall at once, and by virtue of such default, become due and payable.

Holders of the first-mortgage bonds of the said Toledo, Cincin-

nati and St. Louis Railroad Company who become parties to this agreement and pay, at the time of signing, $10, in respect of every bond of one thousand dollars held by them, shall receive trustees' certificates for new second-mortgage bonds to an amount equal to the amount of such first-mortgage bonds held by them, including interest thereon to be computed from last payment to the 1st day of January, 1888, at six per cent. per annum.

Holders of the first-mortgage bonds of the Toledo, Delphos and Burlington Railroad Company who become parties to this agreement and pay, at the time of signing, $10, in respect of each bond for one thousand dollars held by them, shall receive trustees' certificates for new second-mortgage bonds to an amount equal to the amount of such first-mortgage bonds held by them, including interest to be computed from last payment to the 1st day of January, 1888, at six per cent. per annum, to which amount shall be added a sum equal to fifty per cent. of the principal of such first-mortgage bonds, excluding interest.

Debenture subscription.—The trustees shall issue their certificates for new second-mortgage bonds to the subscribers (parties hereto) or their assigns, to what is known as the debenture subscription for six hundred thousand dollars of December, 1882, for an amount equal to five-eighths of the face of the obligations or receipts held by them excluding interest, that is to say, for five-eighths of about four hundrd and sixty thousand dollars.

Such being the estimated amount actually paid on account of such six hundred thousand debenture subscription to and including July 1st, 1883.

32 The trustees' certificates to be exchanged for second-mortgage bonds of this new company when they are issued when tendered in the sums of one thousand dollars.

Preferred stock.—The new company shall create and deliver to the trustees preferred capital stock, in shares of one hundred dollars each, to the amount of twelve million dollars entitled to a six per cent. (non-cumulative), dividend before any dividend shall be paid on the common stock.

The holders of income bonds of the Toledo, Cincinnati and St. Louis Railroad Company, being a second mortgage on the road from Kokomo to East St. Louis, parties hereto, who shall at the time of signing subscribe in books to be prepared for that purpose by the trustees for an amount of such preferred stock equal to the amount of their bonds deposited, and shall then pay five dollars in respect of each share so subscribed for, shall receive trustees' certificates calling for such shares when issued.

The holders of income bonds of the Toledo, Delphos and Burlington Railroad Company, secured by a second mortgage of that company upon its said road, extending from Toledo to Kokomo, parties hereto, who shall at the time of signing subscribe in books to be prepared by the trustees for that purpose for an amount of such preferred stock equal to the amount of their bonds deposited, and shall then pay to the trustees, in respect of each share so subscribed for, the sum of five dollars, shall receive the trustees' certificates calling

for the shares when issued, and shall receive at the same time certificates calling for an additional amount of such preferred stock, equal to fifty per cent. of their said bonds so deposited; provided they shall then pay to the trustees for the general purpose of this agreement and plan a sum of money equal to one per cent. of the par value of such additional certificate so received.

The holders of what is known as the Delphos Trust post, twenty-five per cent. payment amounting to about three hundred thousand dollars, parties hereto, shall be entitled to receive at the time of signing, trustees' certificates exchangeable when presented in sums of one hundred dollars, or multiples thereof, for preferred stock of the new company, when issued for an amount equal to five-eighths of the face of the obligations or receipts held by them, excluding interest, provided they shall pay on signing one per cent. of the par value of such preferred stock for the general purposes of this agreement and plan.

33 Common stock.—The said company shall create and deliver to the trustees common capital stock to the amount of five million dollars. Holders of the preferred or common stock of the consolidated company and holders of stock of either of said companies, mortgagors, may subscribe for such common stock to the amount of one-fourth of their holding of the above-mentioned common or preferred stock, paying at the time of such subscription not less than two dollars and fifty cents, nor more than five dollars per share, as may then be determined by the trustees, for each share of stock so subscribed for, and receiving trustees' certificates calling for shares when issued.

Such stockholders shall have the exclusive right to subscribe for the new common stock for the period of thirty days after such notice as the trustees may think proper to give by publication or otherwise.

At the expiration of thirty days above mentioned, the parties to this agreement shall have the exclusive right for ten days to subscribe for the new common stock, on paying five dollars per share at the time of subscription. The common or preferred stock not subscribed for as above provided may be disposed of by the trustees in their discretion, for the general purposes of this agreement and plan of organization.

All moneys paid in for subscriptions to common or preferred stock, with any interest that may have been allowed by the trust company, to be returned in the event of the failure to create the new company as provided in this agreement.

If any bondholders shall fail to avail themselves of the privilege of becoming a party to this agreement within such time as the trustees may in their discretion limit for that purpose, the trustees are authorized to use and dispose of all the securities that would have been deliverable to such non-assenting bondholder or bondholders had he or they assented, for the purpose of providing that part of the purchase-money necessary to pay any dividend payable out of the proceeds of sale in respect of such non-assenting bonds. All surplus bonds and shares, that is, all over and above the amount

subscribed for and taken under this plan and agreement, shall be disposed of by the trustees for the general purpose of this agreement and plan of organization, and the benefit of the new company.

In witness whereof, we, the undersigned, have, on this 9th day of April, in the year 1884, hereunto set our names.

34 (Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc., complainant, *vs.* Toledo St. Louis & Kansas City R. R. Co., *et al.* respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit. A. Filed. May 28, 1900. Irvin Belford, clerk. Clarence Brown, solicitor for receiver, Toledo, O.

"B."

Memorandum of agreement made this the eighteenth day of December, 1885, between James M. Quigley, of the first part, who is chairman of the trustees for the first-mortgage bondholders of the Toledo, Delphos and Burlington Railroad Company—main line, and chairman of the trustees of the first-mortgage bondholders of the Toledo, Cincinnati and St. Louis Railroad Company—St. Louis division; and also chairman of the bondholders' committee—said committee being composed of all the trustees aforesaid acting together; and Sylvester H. Kneeland, and his associates, of the second part.

Witnesseth: That whereas, the party of the first part on behalf of the bondholders represented and for the purpose of carrying into effect as near as may be a certain trust agreement dated April 9th, 1884, has agreed as follows, with the said party of the second part, to wit:

The said party of the second part agrees for and on behalf of the party of the first part to attend the sale at Indianapolis of the aforesaid railroads mentioned, on the 30th day of December, instant, and to purchase said property under the terms of said sale and to comply with said terms, and to advance the money that may be necessary, namely eighty-five thousand dollars; and the party of the first part agrees that all the bonds represented by him shall be at the disposal of the party of the second part to pay for the property so purchased, should the same be necessary.

The party of the second part, having offered to take the property upon certain terms and to create certain corporations and deliver certain securities to the trustees aforesaid to be delivered by
35 them to the holders of first-mortgage bonds and in lieu thereof, and for other purposes—Now, if said offer shall be accepted, then and in that event the carrying out of that contract is the end of this. But if said offer shall not be accepted, then and in that event the party of the first part agrees that he will, within twelve days from and after said sale, return to the party of the second part all moneys advanced and expended by him and all sums

for which he may have become liable in and about this business, together with a reasonable compensation for his own time and trouble.

And it is further agreed that the offer aforesaid made, or any offer to be made, by the party of the second part as to creating the corporations and delivering new securities, must be accepted or rejected by the party of the first part on or before twelve o'clock noon, of Saturday the 9th day of January, 1886, at the office of the party of the second part; and if said offer is not at that time formally rejected, and if the said money is not refunded at the time specified, then and in that event the said offer shall be considered as accepted, and the party of the second part shall carry the same into effect.

In testimony whereof, witness our hands and seals on the day and date above written.

JAMES M. QUIGLEY, [L. S.]
SYLVESTER H. KNEELAND. [L. S.]

Witness-:
I. NEWTON BAKER.
R. G. INGERSOLL.

(Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc., complainant, *vs.* Toledo, St. Louis and Kansas City R. R. Co. *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company. Exhibit. B. Filed. May 28, 1900. Irvin Belford, clerk. Clarence Brown solicitor for receiver. Toledo, Ohio.

36

EXHIBIT C.

This agreement made and entered into by and between James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, trustees for the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company, a corporation of the States of Indiana and Illinois, owning a line of railroad extending from Kokomo, Indiana, to East St. Louis, in the State of Illinois, acting under a deed of trust bearing date April 9th, 1884, parties of the first part, and Sylvester H. Kneeland, for himself and associates, party of the second part.

37 Witnesseth, whereas, the division of the Toledo, Cincinnati & St. Louis railroad, running from Kokomo, Indiana, to East St. Louis, Illinois, together with all its property and franchises, was on the 30th day of December, 1885, on an order of sale issued out of the circuit court of the United States for the district of Indiana by virtue of a *deed* rendered in a case wherein The Central Trust Company of New York, E. T. Leonard, James M. Quigley and others were complainants, and The Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana and Illinois were defendants, duly sold; and

Whereas, Sylvester H. Kneeland, party of the second part, became the purchaser at said sale, under a certain contract bearing date

December 18th, 1885, between James M. Quigley, chairman, etc., of the first part, and Sylvester H. Kneeland and his associates, of the second part; and,

Whereas, the said party of the second part became and was also on the said 30th day of December, 1885, the purchaser under the said contract of December 18th, 1885, of the Toledo division of the Toledo, Cincinnati & St. Louis railroad, running from Toledo, Ohio, to Kokomo, Indiana, together with all its property and franchises, the same having been sold by virtue of a decree rendered in the suit of The Central Trust Company of New York, James M. Quigley, Charles T. Harbeck, and John McNab, complainants, and The Toledo, Delphos & Burlington Railroad Company of Ohio and Indiana, and other-, defendants, in the United States court for the district of Indiana; and,

Whereas, the two railroads, or said two mortgage divisions, so purchased, together run and extend from the city of Toledo, Ohio, to the city of East St. Louis, Illinois, running through the States of Ohio, Indiana, and Illinois, forming a continuous line of railway about four hundred and fifty miles in length, the Toledo, Cincinnati & St. Louis railroad or division extending from Kokomo, Indiana, to East St. Louis, Illinois, and the Toledo, Delphos & Burlington railroad or division extending from Toledo, Ohio, to Kokomo, Indiana; and,

Whereas, the parties of the first part representing first-mortgage bondholders, subscribers to the deed of trust aforesaid, have determined as the most available method to secure the best results for such subscribers, to transfer all their right, title and interest in the said road or division extending from Kokomo, Indiana, to East St. Louis, in the State of Illinois, and to sell and transfer all the
38 first-mortgage bonds held by said first party secured by mortgage on said division from Kokomo to East St. Louis, to the party of the second part upon the conditions and for the considerations hereinafter specifically mentioned.

Now, therefore, in consideration of the premises and for the considerations hereinabove and hereinafter mentioned the said party of the second part hereby covenants and agrees to and with the said parties of the first part that he and his associates will complete the said purchases in accordance with the terms of the said decrees and that he and his associates will as soon as proper notices can be given and the laws in that behalf complied with, proceed to form under the laws of the State of Ohio a railroad corporation to be called and named, —— of Ohio, with a capital stock of, —— and a like corporation under the laws of the State of Indiana, to be named and called —— of Indiana, with a capital stock of —— and a like corporation under the laws of the State of Illinois, to be named and called, —— of Illinois, with a capital stock of —— and the party of the second part hereby agrees that he will deed to the said corporation to be created in the State of Ohio, all that part of said railroad that lies in said State, provided said party of the second part shall make and execute an agreement with the trustees for first-mortgage bondholders of the line from Toledo to Kokomo, subscribers to the

trust deed of April 9, 1884, substantially of even tenor and effect with this agreement, which said second party shall obtain the transfer of said line and property from Kokomo to Toledo, and purchase from said trustees the first-mortgage bonds represented by them secured by mortgage upon said divisions from Kokomo to Toledo and to the corporation to be created in the State of Indiana he will deed that portion of said line situated in said State, and to the corporation to be formed in Illinois, the part of said line lying and being in that State and the said party of the second part for himself and associates hereby covenants and agrees that he will as soon as practicable after the formation of the said three corporations consolidate the same by virtue of and in accordance with the laws of the said several States, said consolidated corporation to be called ——.

And it is further agreed between the parties hereto, that the said consolidated company so to be created, may and shall issue its bonds to the amount of twenty thousand dollars per mile of line owned by the said consolidated company including any additional line
39 that may be built, commencing at or near Dupont, in the State of Ohio, and extending to a point at or near Decatur, in the State of Indiana, within the termini aforesaid, such bonds to be of the denomination of one thousand dollars each, payable thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually, principal and interest, in gold, in the city of New York and secure the same by a deed of trust covering all of said consolidated road, its property and franchises, the entire line herein described, as well as all property of all kinds to be thereafter acquired by said consolidated company, and shall issue in addition common stock to the amount of twenty-five thousand dollars per mile and the said bonds and stock so issued shall be deposited with two trustees, one to be selected by said party of the second part, and one by the parties of the first part, including the trustees for the first-mortgage bondholders of the Toledo, Delphos & Burlington railroad, or the division extending from Toledo, Ohio, to Kokomo, Indiana, and by said trustees to be delivered to the party of the second part upon the conditions and for the considerations and to effect and carry out the purposes hereinabove and hereinafter mentioned and set forth.

The said party of the second part for himself and his associates hereby contracts and agrees that the said consolidated company so to be formed as aforesaid will as soon as formed proceed without unnecessary delay to change the gauge of the railroad herein mentioned extending from Toledo, Ohio, to East St. Louis, Illinois, so that the same shall be of the standard gauge, it being now what is called "a narrow-gauge" road, and lay down steel rails of not less than sixty pounds to the yard, main line, widen all embankments and cut to the requisite width, widen, strengthen and rebuild bridges if the same may be necessary, construct all necessary stations, tanks, repair shops and sidings so that the said road reaching from Toledo, Ohio, to East St. Louis, Illinois, shall be in all respects a first-class road of standard gauge.

And further, the said party of the second part, for himself and associates agrees that the said consolidated company shall equip said road with all necessary cars of every description and with the requisite motive power and agrees that he will use the proceeds of at least four of said first-mortgage bonds per mile of road, in the purchase of said equipment.

And it is further agreed by and between the parties hereto, that of the bonds so to be issued by the said consolidated com-
40 pany, the trustees so to be selected as aforesaid shall as soon as said bonds are issued, deliver to the party of the second part two thousand of said bonds of one thousand dollars each, and shall also deliver to the said party of the second part twenty-five thousand shares of the common capital stock of the said consolidated company of the par value of one hundred dollars per share hereinafter provided for, as soon as the same is issued, said bonds and said stock to be used by the said party for the purposes set forth in this contract.

And it is further agreed between the said parties, that as fast as said rolling stock is placed upon the line, bonds of the said consolidated company shall be delivered by said trustees, so to be chosen as aforesaid, to the said party of the second part, to the amount of the value of such rolling stock, and as fast as said work of completing said road, buildings, structures and appliances progresses under and in accordance with this contract of changing the gauge and furnishing materials necessary, the said trustee shall deliver to the party of the second part the said first-mortgage bonds and stock to the value under this contract of such work done or materials furnished, the value thereof to be certified in writing by the chief engineer of the said consolidated company.

And it is further agreed by and between the parties hereto, that the common capital stock of the said consolidated railroad company shall be an amount equivalent to twenty-five thousand dollars per mile of line, and no more, said common capital stock to be divided into shares of one hundred dollars each, and said stock shall be immediately issued and deposited with the trustees, to be chosen as aforesaid, and is to be delivered upon the same conditions and for the same considerations that the said first-mortgage bonds are to be delivered, the party of the said second part hereby contracting and agreeing to do and perform the things herein stipulated to be done and performed by said second party for and in consideration of said first-mortgage bonds, and said common stock, and for and in consideration of said original first-mortgage bonds, held by said first parties under said trust deed, as hereinbefore set forth, having agreed to do the things mentioned herein, in consideration of said first-mortgage bonds, and of said common stock, among other things.

And it is further agreed that the consolidated company, immediately upon being and becoming lawfully authorized to issue stock, shall issue its coupon non-voting convertible stock, prepared
41 for registry to a name or to bearer, in shares of one hundred dollars each, to the amount of $5,805,000, having coupons attached payable semi-annually at the rate of 4 per cent. per annum,

if earned in whole, or in part, to the extent earned, and covering ten years from January 1, 1888, namely, twenty coupons.

Whenever the net earnings of the road for the period covering a coupon are not sufficint to pay the same, then the holder of such coupons shall surrender them on receiving their *pro rata* share of such net earnings as there may be for that period. Said coupon convertible stock to be convertible after five years from date of issue at the pleasure of the holder into common stock of the company, and if not converted in ten years from date of issue, to become a preferred four per cent., non-cumulative, non-voting stock. Four million eight hundred and five thousand dollars of said issue to be used and disposed of as follows: To the parties of the first part ten shares of said coupon stock for each $1,000 first-mortgage bond turned over to the said party of the second part, and the company shall turn over to the said parties of the first part, on their order, the balance of the coupon convertible stock that would have been deliverable to such trustees had they represented the entire issue of first-mortgage bonds, upon the furnishing by them to said company, with a certificate of the clerk of the court that the money sufficient to cover said balance had been duly deposited in court by the said parties of the first part. And the remaining $1,000,000 of said non-voting, coupon, convertible stock, after providing for the amount to be delivered to the trustees for the Toledo division before mentioned, shall be deposited in the hands of the said two trustees, to be delivered to the party of the second part for use in compromising, adjusting and settling claims and suits now existing and pending, or suits that may hereafter be brought against the said lines of the said consolidated company. And such amount of said stock shall be issued by said trustees to the party of the second part upon his furnishing vouchers to them showing for what purposes or claims said stock has been or is to be used. And such balance as remains, if any, shall be subject to the order of said consolidated company, and no other coupon stocks or bonds of indebtedness shall be issued for any purpose except for the acquiring of additional road, and then only with the consent of a two-thirds vote of the coupon stock present at a meeting called for the purpose, after due notice shall have been given to all holders of record and published at
42 least once a week for three successive weeks in two daily leading newspapers in the cities of Boston and New York.

And it is further agreed between the parties hereto that if the party of the second part fails to make the committee or trustees, representing under the deed of trust of April 9, 1884, before mentioned, the 1st-mortgage bondholders of the Toledo, Delphos and Burlington Railroad Company; that is to say, the division between Toledo, Ohio, and Kokomo, Indiana, a contract for the purchase of said division and of the original first-mortgage bonds upon said division, now held by said committee and trustees under said trust deed hereinbefore mentioned, then and in that event the said party of the second part agrees to form a corporation in the State of Indiana as aforesaid, and a corporation in the State of Illinois as aforesaid, and convey the said road and property from Kokomo, Indiana,

to East St. Louis, Illinois, to said corporations respectively, and agrees, as soon as practicable, to consolidate the said two corporations, and first-mortgage bonds for the same amount per mile as herein mentioned and common stock to the same amount per mile as herein mentioned, shall be issued by the said consolidated company and delivered to two trustees, one to be chosen by the parties of the first part, and one by the party of the second part, and by said trustees to be delivered to the party of the second part, upon the same terms and conditions and for the same considerations as hereinbefore stated, and the party of the second part shall give the same considerations therefor, and shall equip said line from Kokomo to East St. Louis in all respects as hereinbefore provided for said entire line from Toledo to East St. Louis, and shall buy rolling stock and motive power in the same proportion per mile; and the said last-mentioned consolidated company shall issue the said coupon stock for said bonds, as aforesaid, to be turned over to the party of the second part and six hundred thousand dollars of the additional coupon stock for the same purpose, and with the same power to issue additional coupon stock for the acquiring of new lines, provided the holders of a majority of the coupon stock shall consent thereto in manner and form as hereinbefore provided, and of the two millions in bonds and the two and one-half millions in stock to be delivered immediately to the party of the second part, there shall instead thereof be delivered twelve hundred thousand dollars in bonds and one and one-half millions in stock for the purposes mentioned.

43 But it is also agreed and understood that if at any time within — the said party of the second part and his associates shall acquire the said line from Toledo, Ohio, to Kokomo, Indiana, then and in that event this contract with regard thereto shall be in full force and effect.

It is further agreed between the parties hereto, that the said parties of the first part will, at the request of the party of the second part, litigate any and all claims that the said party of the second part may wish to resist, and will sign all papers that may be necessary in the defense of such claims, and will do all acts and things necessary and proper to be done for the defense thereof, at the expense of the party of the second part, said party of the second part having the right to select all attorneys and agents to act in that behalf, the said party of the second part to be at the expense of all such litigation.

And it is further agreed that the said party of the second part shall have the right to use and pledge any of said property and securities for the purpose of procuring bonds and bondsmen that may be necessary to give or procure in the litigation of said claims, or of any suits growing out of the foreclosure proceedings herein on the sale or sales thereunder before the creation of said consolidated company.

And it is further agreed between the parties that the said parties of the first part, who have acted as trustees under the said deed of trust, bearing date April 9, 1884, are entitled as compensation for

services rendered and expenditures made in this behalf, as follows: Such sums as may be mutually agreed upon between the parties hereto.

And it is further agreed between the parties hereto, that the said party of the second part shall complete and equip, according to the provisions of this agreement, and deliver said line of railroad to said new proposed consolidated company, on or before the first day of July, A. D. 1888, and in the event of his failure so to do, all his rights under this contract shall terminate; provided, however, that if he shall encounter unfor-seen obstacles, and without his fault, said trustees to be appointed hereunder shall extend said time for a period not exceeding twelve months from said July 1, A. D. 1888.

And it is further agreed between the parties hereto, in cases where in this contract it is provided that two trustees shall act, that where these trustees fail to agree they shall choose a third, and the decision of any two shall be final and binding upon all parties, with the exception hereinafter mentioned.

44 And it is further agreed, that in the event of any change in this agreement becoming necessary or expedient in the interest of all concerned, such change may be made by the concurrent unanimous action of said two original trustees and the said party of the second part.

And it is hereby further agreed by the parties of the first part that upon the due and legal execution and delivery of this contract in triplicate, one to be delivered to each party thereto, and one to be delivered to the trustees for the Toledo division hereinbefore described, and upon the performance by said party of the second part of the terms and conditions of purchase of said St. Louis division from Kokomo to East St. Louis, in full compliance with the terms, conditions and stipulations of the decree under which the said purchase was made, that the said parties of the first part will deliver to the said party of the second part the original first-mortgage bonds upon said St. Louis division, held by said parties of the first part under said trust agreement, so that, and for the purpose of enabling said party of the second part to use the same in paying that part of the purchase-money bid for said division, properly payable with said bonds as provided by the decree.

It is also agreed that the said consolidated company shall, during the period of construction, use all of its net earnings to make any betterments and permanent improvements that may be deemed desirable, and the party of the second part shall furnish any and all money that may be necessary to pay all interest that may accrue on said first-mortgage bonds as the same falls due.

The said party of the second part hereby agrees to pay all expenses that may have been legally incurred by said parties of the first part in this behalf, including all legal expenses for suits commenced or pending, and all other expenses in this behalf which may not be paid by order of the court out of any fund arising from the sale of said property.

In the event of the death or resignation of the trustees appointed by the parties of the first part, his successor may and shall be ap-

pointed by James M. Quigley, Halsey J. Boardman and Chas. T. Harbeck or a majority of them—and in the event of the death or resignation of the trustee appointed by the party of the second part, his successor may be appointed by the party of the second part.

In testimony whereof the said parties have hereunto set their hands and seals this twenty-third day of January, A. D. 1886.

(Signed) JAMES M. QUIGLEY.
HALSEY J. BOARDMAN.
WARREN D. HOBBS.

45 In presence of

The words from "after" to mentioned inclusive, being interlined on the twelfth page before execution.

H. A. KINGSBURY.

SYLVESTER H. KNEELAND,
For Himself and Associates.

STATE OF NEW YORK, }
City and County of New York, } ss:

On the 23d day of January, A. D. 1886, before me personally appeared James M. Quigley, Halsey J. Boardman, Warren D. Hobbs and Sylvester H. Kneeland, all to me known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged to me that they executed the same.

Witness my hand and notarial seal at said city of New York, the day last aforesaid.

[SEAL.] H. A. KINGSBURY,
Notary Public, N. Y. Co.

(Endorsement:) United States circuit court for the northern district of Ohio, western division. Continental Trust Company of the City of New York, complainants, against Toledo, St. Louis and Kansas City Railroad Company *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit. C. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

46 EXHIBIT D.

This agreement made and entered into by and between James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company of Ohio and Indiana, owning a line of rail-
47 road extending from Toledo, Ohio, to Kokomo, Indiana, commonly known as the Toledo division of the Toledo, Cincinnati and St. Louis railroad, acting under a deed of trust bearing date April 9th, 1884, parties of the first part, and Sylvester H. Kneeland for himself and associates, party of the second part.

Witnesseth: Whereas, the Toledo division of the Toledo, Cincinnati & St. Louis Railroad Company, running from Toledo, Ohio, to Kokomo, Indiana, together with all its property and franchises, was on the thirteenth day of December, 1885, in the suit of The Central Trust Company of New York, James M. Quigley, Charles T. Harbeck and John McNab, complainants, and The Toledo, Delphos & Burlington Railroad Company, of Ohio and Indiana, and others, defendants, sold under a decree of the United States court for the district of Indiana in said cause rendered; and,

Whereas, Sylvester H. Kneeland, party of the second part, became the purchaser at said sale under a certain contract, bearing date December 18th, 1885, between James M. Quigley, chairman, etc., of the first part, and Sylvester H. Kneeland and his associates, of the second part; and,

Whereas, the said party of the second part became and was, also on the said 30th day of December, 1885, the purchaser, under the said contract of December 18, 1885, of the property and franchises of the Toledo, Cincinnati & St. Louis Railroad Company, that is to say, of the division extending from Kokomo, Indiana, to East St. Louis, Illinois, commonly known as the St. Louis division, on an order of sale issued out of the circuit court of the United States for the district of Indiana, upon a decree rendered in a cause wherein The Central Trust Company of New York, E. F. Leonard, James M. Quigley and others, were complainants, and The Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana and Illinois were defendants; and,

Whereas, the two railroads, or said two mortgage divisions, so purchased together run and extend from the city of Toledo, Ohio, to the city of East St. Louis, Illinois, running through the States of Ohio, Indiana and Illinois, forming a continuous line of railway about four hundred and fifty miles in length, the Toledo, Delphos & Burlington railroad or division, extending from Toledo, Ohio, to Kokomo, Indiana, and the Toledo, Cincinnati & St. Louis railroad or division, extending from Kokomo, Indiana, to East St. Louis, Illinois; and

48 Whereas, the parties of the first part, representing first-mortgage bondholders, subscribers to the deed of trust of April 9th, 1884, aforesaid, have determined as the most available method to secure the best results for such subscribers to transfer all their right, title and interest in the said road or division, extending from Toledo, Ohio, to Kokomo, Indiana, and to sell and transfer all the first-mortgage bonds held by said parties of the first part secured by mortgage on said division from Toledo to Kokomo, to the party of the second part, upon the conditions and for the considerations hereinafter specifically mentioned.

Now, therefore, in consideration of the premises and for the considerations hereinabove and hereinafter mentioned, the said party of the second part hereby covenants and agrees to and with the said parties of the first part, that he and his associates will complete the said purchases in accordance with the terms of the said decrees, and that he and his associates will as soon as the proper notice can be

given and the laws in that behalf can be complied with, proceed to form under the laws of the State of Ohio, a railroad corporation to be called and named the —— of Ohio, with a capital stock of ——, and a like corporation under the laws of the State of Indiana, to be named and called the —— Indiana, with a capital stock of ——, and a like corporation under the laws of the State of Illinois, to be named and called the —— of Illinois, with a capital stock ——, and the party of the second part hereby agrees that he will deed to the said corporation to be created in the State of Ohio, all that part of said railroad that lies in said State, and to the corporation to be created in the State of Indiana he will deed that portion of said line situate in said State, and to the corporation to be formed in Illinois the part of said line lying and being in that State, provided said party of the second part shall make and execute with the trustees for the first-mortgage bondholders of the line from Kokomo to East St. Louis, subscribers to the trust deed of April 9th, 1884, and agreement substantially of even tenor and effect with this agreement by which said party shall obtain the transfer of said line and property from Kokomo to East St. Louis, and purchase from said trustees the first-mortgage bonds represented by them secured by mortgage on said division from Kokomo to East St. Louis, and the said party of the second part, for himself and associates, further covenants and agrees that he will as soon as practicable after the formation of the said three corporations, consolidate the same by virtue of and
49 in accordance with the laws of the said several States, said consolidated corporation to be called ——.

And it is further agreed between the parties hereto that the said consolidated company so to be created may and shall issue its bonds to the amount of twenty thousand dollars per mile of line owned by the said consolidated company, including any additional line that may be built commencing at or near Dupont, in the State of Ohio, and extending to a point at or near Decatur, in the State of Indiana, within the termini aforesaid, such bonds to be of the denomination of one thousand dollars each, payable thirty years after date with interest at the rate of six per cent. per annum, payable semi-annually, principal and interest in gold, in the city of New York, and secure the same by a deed of trust covering all of said consolidated road, its property and franchises, the entire line herein described, as well as all property of all kinds, to be thereafter acquired by said consolidated company, and issue in addition common stock to the amount of twenty-five thousand dollars per mile, and the said bonds and stock so issued shall be deposited with two trustees, one to be selected by the said party of the second part, and one by the parties of the first part, including the trustees for the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company of the division extending from Kokomo, Ind., to East St. Louis, Illinois, and by said trustees to be delivered to the party of the second part upon the conditions and for the considerations, and to effect and carry out the purposes hereinabove and hereinafter mentioned and set forth.

The said party of the second part, for himself and his associates

hereby contracts and agrees that the said consolidated company so to be formed as aforesaid will as soon as formed proceed without unnecessary delay to change the gauge of the railroad herein mentioned extending from Toledo, Ohio, to East St. Louis, Illinois, so that the same shall be of the same standard gauge, it being now what is called a "narrow-gauge" road, and lay down steel rails of not less than sixty pounds to the yard, main line, widen all embankments and cuts to the requisite width, widen, strengthen and rebuild bridges as the same may be necessary, construct all necessary stations, tanks, houses, repair shops and sidings, so that the said road reaching from Toledo, Ohio, to East St. Louis, Illinois, shall be in all respects a first-class road of standard gauge.

50 And further the said party of the second part, for himself and associates, agrees that the said consolidated company shall equip said road with all necessary cars, of every description, and with the requisite motive power, and agrees that he will use the proceeds of at least four of said first-mortgage bonds per mile of road in the purchase of said equipment.

And it is further agreed by and between the parties hereto, that of the bonds so to be issued by the said consolidated company, the trustees so to be selected as aforesaid, shall as soon as said bonds are issued, deliver to the party of the second part two thousand of said bonds of one thousand dollars each, and shall also deliver to the said party of the second part twenty-five thousand shares of the common capital stock of the said consolidated company, of the par value of one hundred dollars per share, hereinafter provided for, as soon as the same is issued; said bonds and said stock to be used by the said party for the purposes set forth in this contract.

And it is further agreed between the said parties that as fast as said rolling stock is placed upon the line bonds of the said consolidated company shall be delivered by said trustees so to be chosen as aforesaid, to the said party of the second part, to the amount of the value of such rolling stock, and as fast as said work of completing said road, buildings, structures and appliances, progresses under and in accordance with this contract of changing the gauge and furnishing the materials necessary, the said trustees shall deliver to the party of the second part the said first-mortgage bonds and stock to the value under this contract of such work done or materials furnished, the value thereof to be certified in writing by the chief engineer of the said consolidated company.

And it is further agreed by and between the parties hereto that the common capital stock of the said consolidated railroad company shall be an amount equivalent to twenty-five thousand dollars per mile of line, and no more, said common capital stock to be divided into shares of one hundred dollars each, and said stock shall be immediately issued and deposited with the trustees to be chosen as aforesaid, and is to be delivered upon the same conditions and for the same considerations that the said first-mortgage bonds are to be delivered, the party of the second part hereby contracting and agreeing to do and perform the things herein stipulated to be done and performed by said party of the second part for and in consideration

of said first-mortgage bonds and said common stock, and for
51 and in consideration on such original first-mortgage bonds held by the parties of the first part under such trust deed as hereinabove set forth, the said party of the second part having agreed to do the things mentioned herein in consideration of said first-mortgage bonds and of said common stock, among other things.

And it is further agreed that the said consolidated company shall issue its coupon non-voting stock in shares of one hundred dollars each, bearing interest at the rate of four per cent. per annum, payable semi-annually, if earned, and shall exchange said coupon stock for the first-mortgage bonds represented by the parties of the first part, and shall for each bond of one thousand dollars give to the holder thereof fifteen hundred dollars in said coupon stock, said stock convertible at the option of the railroad company shall be an amount equivalent to twenty-five thousand dollars per mile of line and no more, said common capital stock to be divided into shares of one hundred dollars each, and said stock shall be immediately issued and deposited with the trustees to be chosen as aforesaid, and is to be delivered upon the same conditions and for the same considerations that the said first-mortgage bonds are to be delivered, the party of the second part hereby contracting and agreeing to do and perform the things herein stipulated to be done and performed by said second party for and in consideration of said first-mortgage bonds, and said common stock, and for and in consideration of said original first-mortgage bonds held by said first parties under said trust deed as hereinbefore set forth, having agreed to do the things mentioned herein in consideration of said first-mortgage bonds, and of said common stock, among other things.

And it is further agreed that the consolidated company immediately upon being and becoming lawfully authorized to issue stock shall issue its coupon non-voting convertible stock prepared for registry to a name or to bearer in shares of one hundred dollars each, to the amount of $5,805,000, having coupons attached payable semi-annually at the rate of four per cent. per annum, if earned, in whole or in part, to the extent earned, and covering ten years from January 1st, 1888, namely, twenty coupons.

Whenever the net earnings of the road for the period covering a coupon are not sufficient to pay the same, then the holders of such coupons shall surrender them on receiving their *pro rata* share of such net earnings as there may be for that period. Said coupon convertible stock to be convertible after five years from date of issue at the pleasure of the holder, into common stock of the company, and if not converted in ten years from date of issue, to be-
52 come a preferred four per cent. non-cumulative, non-voting stock, $4,805,000 of said issue to be used and disposed of as follows: To the parties of the first part fifteen shares of said coupon stock for each one thousand dollars first-mortgage bond turned over to the said party of the second part, and the company shall turn over to the said parties of the first part, or their order, the balance of the coupon convertible stock that would have been deliverable to such trustees had they represented the entire issue of first-mortgage

bonds, upon the furnishing by them to said company with a certificate of the clerk of the court that the money sufficient to cover said balance has been duly deposited in court by the said parties of the first part.

And the remaining $1,000,000 of said non-voting coupon convertible stock, after providing for the amount to be delivered to the trustees for the first-mortgage bondholders of the St. Louis division before mentioned, shall be deposited in the hands of said two trustees to be delivered to the party of the second part for use in compromising, adjusting and settling claims and suits now existing and pending, or suits that may hereafter be brought against the said lines, or the said consolidated company.

And such amount of said stock shall be issued by said trustees to the party of the second part upon his furnishing vouchers to them showing for what purposes or claims said stock has been or is to be used.

And such balance as remains, if any, shall be subject to the order of said consolidated company, and no other coupon stocks or bonds of indebtedness shall be issued for any purpose except for the acquiring of additional road, and then only with the consent of a two-thirds vote of the coupon stock present at a meeting called for the purpose, after due notice shall have been given to all holders of record, and published at least once a week for three successive weeks in two daily leading newspapers in the cities of Boston and New York.

It is further agreed between the parties hereto that if the party of the second part fails to make with the committee or trustees, representing under the deed of trust of April 9th, 1884, before mentioned, the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company, that is to say, the division between Kokomo, Indiana, and East St. Louis, Illinois, a contract for the purchase of said division and of the original first-mortgage bonds upon said division, now held by said committee and trustees under said trust deed hereinbefore mentioned, then and in that event the said party of the second part, agrees to form a corporation in
53 the State of Ohio, as aforesaid, and a corporation in the State of Indiana as aforesaid, and convey the said road and property from Toledo, Ohio, to Kokomo, Indiana, to said corporations respectively, and agrees as soon as practicable to consolidate the said two corporations and first-mortgage bonds for the same amount per mile as herein mentioned, and common stock to the same amount per mile as herein mentioned shall be issued by the said consolidated company and delivered to two trustees, one to be chosen by the parties of the first part, and one by the party of the second part, and by said trustees to be delivered to the party of the second part upon the same terms and conditions and for the same considerations as hereinbefore stated, and the party of the second part shall give the same considerations therefor, and shall equip said line from Toledo to Kokomo in all respects as hereinbefore provided for said entire line from Toledo to East St. Louis, and shall buy rolling stock and motive power in the same proportion per mile, and the said

last-mentioned consolidated company shall issue the said coupon stock for said bonds as aforesaid, to be turned over to the party of the second part and four hundred thousand dollars of the additional coupon stock for the same purposes, and with the same power to issue additional coupon stock for the acquiring of new line, provided the holders of a majority of the coupon stock shall consent thereto in manner and form as hereinbefore provided, and of the two millions in bonds, and the two and a half millions in stock to be delivered immediately to the party of the second part, there shall instead thereof be delivered eight hundred thousand dollars in bonds and one million in stock for the purposes mentioned.

But it is also agreed and understood that if at any time within —— the said party of the second part, and his associates, shall acquire the said line from Kokomo, Indiana, to East St. Louis, Illinois, then in that event, this contract with regard thereto, shall be in full force and effect.

It is further agreed, between the parties hereto, that the said parties of the first part will, at the request of the party of the second part, litigate any and all claims that the said party of the second part may wish to resist, and will sign all papers that may be necessary in the defense of such claims, and will do all acts and things necessary and proper to be done for the defense thereof at the expense of the party of the second part, and party of the second part having the right to select all attorneys and agents to act in that behalf, the said party of the second part to be at the expense of all such litigation.

54 And it is further agreed that the said party of the second part shall have the right to use and pledge any of said property and securities for the purpose of procuring bonds and bondsmen that may be necessary to give or procure in the litigation of said claims, or of any suits growing out of the foreclosure proceedings herein, or the sales thereunder before the creation of said consolidated company.

And it is further agreed between the parties hereto, that the said parties of the first part, who have acted as trustees under the said deed of trust bearing date April 9th, 1884, are entitled as compensation for services rendered and expenditures made in this behalf as follows:

Such sums as may be mutually agreed upon between the parties hereto.

And it is further agreed, between the parties hereto, that the said party of the second part shall complete and equip, according to the provisions of this agreement, and deliver said line of railroad to said new proposed consolidated company on or before the first day of July, A. D. 1888, and in the event of his failure so to do, all his rights under this contract shall terminate, provided, however, that if he shall encounter unforeseen obstacles and without his fault, said trustees to be appointed hereunder shall extend said time for a period not exceeding twelve months from said July 1st, A. D. 1888.

And it is further agreed, between the parties hereto, in cases where in this contract, it is provided that two trustees shall act, that where these trustees fail to agree they shall choose a third, and the

decision of any two shall be final and binding upon all parties with the exception hereinafter named.

And it is further agreed that in the event of any change in this agreement becoming necessary or expedient, in the interests of all concerned, such change may be made by the concurrent unanimous action of said two original trustees and the said party of the second part.

And it is further agreed by the parties of the first part that upon the due and legal execution and delivery, of this contract in triplicate, one to be delivered to each party hereto, and one to be delivered to the trustees for the St. Louis division hereinbefore described, and upon the performance by said party of the second part of the terms and conditions of purchase of said St. Louis division from Kokomo to East St. Louis, in full compliance with the terms, conditions and stipulations of the decree under which said purchase was made, that the said parties of the first part will
55 deliver to the said party of the second part the original first-mortgage bonds upon said St. Louis division held by said parties of the first part under said trust agreement so that and for the purpose of enabling said party of the second part to use the same in paying that part of the purchase-money bid for said division property, payable with said bonds as provided by the decree.

It is also agreed that the said consolidated company shall during the period of construction use all its net earnings to make any betterments and permanent improvements that may be deemed desirable, and the party of the second part shall furnish any and all money that may be necessary to pay all interest that may accrue on said first-mortgage bonds as the same falls due.

The said party of the second part hereby agrees to pay all expenses that have been legally incurred by said parties of the first part in this behalf, including all legal expenses for suits commenced or pending, and all other expenses in this behalf which may not be paid by order of the court out of funds arising from the sale of said property.

In the event of the death or resignation of the trustee appointed by the parties of the first part, his successor may and shall be appointed by James M. Quigley, Halsey J. Boardman, and Charles T. Harbeck, or a majority of them, and in the event of the death or resignation of the trustee appointed by the party of the second part, his successor may be appointed by the party of the second part.

In witness whereof, the said parties have hereunto set their hands and seals, this twenty-third day of January, A. D. 1886.

JAMES M. QUIGLEY.
CHARLES T. HARBECK,
Trustee, etc.

JOHN McNAB.
SYLVESTER H. KNEELAND,
For Self and Associates.

In presence of:
H. A. KINGSBURY.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

On this 23d day of January, A. D. 1886, before me personally appeared James M. Quigley, John McNab and Sylvester H. Kneeland, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

56 Witness my hand and notarial seal the day and year last aforesaid.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

THE STATE OF NEW YORK, }
City & County of New York, } *ss:*

On this 26 day of January, 1886, before me personally appeared Charles T. Harbeck, to me known and known to me to be one of the persons described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Witness my hand and notarial seal the day and year last aforesaid.

H. A. KINGSBURY,
Notary Public, N. Y. Co.

(Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc. complainant *vs.* Toledo, St. Louis and Kansas City R. R. Co. *et al.* respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit D. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed May 28, 1900. Irvin Belford, clerk.

EXHIBIT "E."

This agreement, made and entered into this twelfth day of June, A. D. eighteen hundred and eighty-six, by and between Sylvester H. Kneeland, a citizen and resident of the city, county and State of New York, party of the first part herein, and the Toledo, Dupont and Western Railway Company, a corporation organized and existing under and by virtue of the statutes of the State of Ohio,

57 in that behalf enacted, and a citizen and resident of the said State of Ohio, party of the second part,

Witnesseth: Whereas, on December thirtieth, A. D. eighteen hundred and eighty-five, under and pursuant to final foreclosure decree, rendered and entered in certain causes in the circuit court of the United States for the district of Indiana, and in the circuit court of the United States for the southern district of Illinois, wherein The Central Trust Company of New York and others were complainants, and The Toledo, Cincinnati and St. Louis Railroad Company and others were defendants, all that part of the railroad and property of the Toledo, Cincinnati and St. Louis Railroad Company

extending from the city of Kokomo, Indiana, to the city of East St. Louis, Illinois, together with all the property, rights, powers, privileges, immunities and franchises thereunto belonging and appertaining, was sold at public foreclosure sale at the door of the United States circuit court room in the city of Indianapolis, Indiana, as an entirety, and

Whereas, at said foreclosure sale Sylvester H. Kneeland, party of the first part herein, became the purchaser of said railroad, property, rights, powers, privileges, immunities and franchises so sold as aforesaid, and

Whereas, on said December thirtieth, A. D. eighteen hundred and eighty-five, under and pursuant to final foreclosure decrees rendered and entered in certain causes in the circuit court of the United States, for the district of Indiana, and in the circuit court of the United States, for the northern district of Ohio, western division, wherein The Central Trust Company of New York and others were complainants, and The Toledo, Cincinnati and St. Louis Railroad Company and others, were defendants, all of that part of the railroad and property of the Toledo, Cincinnati and St. Louis Railroad Company now owned by the party of the first part extending from the city of Toledo, Ohio, to the city of Kokomo, Indiana, together with all the property, rights, powers, privileges, immunities and franchises thereunto belonging and appertaining, was sold at public foreclosure sale at the door of the United States circuit court room in the city of Indianapolis, Indiana, as an entirety, and

Whereas, at said foreclosure sale Sylvester H. Kneeland, party of the first part herein, became the purchaser of said railroad property, rights, powers, privileges, immunities and franchises so sold as aforesaid, and

Whereas on February fifth, A. D. eighteen hundred and eighty-six, the said two sales and purchases hereinabove mentioned
58 were, by proper orders and decrees entered in said causes, in all things approved and confirmed, and

Whereas, on the tenth day of March, A. D. eighteen hundred and eighty-six, good and sufficient deeds of, conveyance for said premises, railroads, properties, rights, powers, privileges, immunities and franchises, so sold at said two foreclosure sales as aforesaid, were duly executed and delivered to the said Sylvester H. Kneeland purchaser as aforesaid, in pursuance of the terms of the said foreclosure decrees and the orders and decrees of court in that behalf entered, and

Whereas, said Sylvester H. Kneeland, party of the first part herein has become, and now is, the owner and possessor by said purchases at foreclosure sale of the railway and property, rights, powers, privileges, immunities and franchises lately known as "the Toledo, Cincinnati and St. Louis railroad," extending from Toledo, Ohio, to East St. Louis, Illinois, that part of said railroad and property lying and being within the State of Ohio, being more particularly described as follows, to wit:

Beginning at a point on the west boundary line of the State of Ohio, in the county of Van Wert, in a southwesterly direction from

Willshire in said county of Van Wert, in said State of Ohio, and extending thence northeasterly through the counties of Van Wert, Allen, Putnam, Henry, Wood and Lucas, in the State of Ohio, to a point at or near the business center of the city of Toledo, in said county of Lucas, State of Ohio, and desires and intends to reorganize and reconstruct said railroad so as to make and constitute a continuous line of standard-gauge railroad from Toledo, Ohio, to East St. Louis, Illinois, upon the line, route and property of the said railroad lately known as "the Toledo, Cincinnati & St. Louis railroad," so purchased by him at said foreclosure sale as herein aforesaid, and

Whereas, at the special instance and request of the said Sylvester H. Kneeland, party of the first part herein, the said The Toledo, Dupont and Western Railway Company, party of the second party herein, has been organized and incorporated, pursuant to law, for the express purpose of, and to the end that, said railroad company, party of the second part herein, shall acquire, own, maintain, operate, use and enjoy all that part of the said railroad and property lately known as "the Toledo, Cincinnati and St. Louis railroad," lying and being within the said State of Ohio, as hereinabove described, together with all the property, rights, privileges,
59 immunities and franchises thereunto belonging and appertaining, and

Whereas, the Toledo, Dupont and Western Railway Company, party of the second part herein, is desirous of purchasing and acquiring the said railroad and franchises hereinbefore described, situated in the State of Ohio, from the said Sylvester H. Kneeland, the owner thereof, for the purpose of owning, reconstructing, maintaining and operating the same.

Now, therefore, it is hereby contracted, covenanted and agreed by and between the said party of the first part and said party of the second part:

First. That for and in consideration of the premises, and upon the receipt of the other and valuable considerations hereinafter recited, the party of the first part hereby contracts, covenants and agrees to convey to the party of the second part by a good and sufficient deed of conveyance, all the title so received by him to that part of the said railroad and property lately known as "the Toledo, Cincinnati and St. Louis railroad;" lying and being within the State of Ohio, as hereinabove described, together with all the property, rights and franchises thereunto appertaining and belonging.

Second. That for and in consideration of the premises, and upon the receipt of the other and valuable considerations hereinafter recited, and for and in consideration of the contracts, covenants and agreements of the party of the second part hereinafter recited and set forth, the said Sylvester H. Kneeland, party of the first part, hereby further contracts, covenants and agrees that he will, without delay, and as soon as the same can be conveniently and lawfully done, cause the railroad companies organized by him, or at his instance and request, under and by virtue of the statutes of the States of Indiana and Illinois, for the purpose of reorganizing, own-

ing, reconstructing, maintaining, operating, using and enjoying those portions of the line of railroad; (the title to which vested in him by virtue of the said purchase), and property lately known as "the Toledo, Cincinnati and St. Louis railroad;" lying and being within the said States of Indiana and Illinois, to consolidate with each other and with the said Toledo, Dupont and Western Railway Company, party of the second part herein, under, pursuant to and in accordance with, the statutes of the said several States of Ohio, Indiana, and Illinois, to the end that a single consolidated company, formed by consolidation of the said Toledo, Dupont and Western Railway Company with the companies organized under and
60 pursuant to the statutes of the States of Indiana and Illinois, shall be and become the owner and purchaser of the continuous line of railroad and property extending from Toledo, Ohio, to East St. Louis, Illinois, lately known as "the Toledo, Cincinnati and St. Louis railroad."

And for and in consideration of the valuable considerations hereinafter recited, and for and in consideration of the contracts, covenants and agreements of the party of the second part hereinafter recited, and for and in consideration of the securities to be executed and issued by said consolidated company, when the same shall have been formed as hereinbefore provided—other than the common capital stock of said consolidated company—the said party of the first part further covenants, contracts and agrees that said consolidated company shall, without delay, and within a reasonable time, broaden the gauge of said railroad from Toledo, Ohio, to East St. Louis, Illinois, so as to make the same of the standard gauge, and shall lay the tracks of said railroad with steel rails of not less than sixty (60) pounds weight to the yard, and make said line of railroad in all respects a first-class standard-gauge railroad and equip the same with proper rolling stock and motive power.

Third. The Toledo, Dupont and Western Railway Company, party of the second part herein, for and in consideration of the execution of this agreement by the party of the first part herein, and for and in consideration of the purchase and conveyance to the said party of the second part of that portion of the railway and property lately known as "the Toledo, Cincinnati and St. Louis railroad," lying and being within the State of Ohio, and of the rights, properties, immunities and franchises thereunto belonging, as hereinbefore mentioned and described, hereby contracts, covenants and agrees to execute and deliver to the party of the first part, his successors or assigns, or to the person or persons designated by the said party of the first part, their successors or assigns, the following securities, to wit:

1. Thirty-four thousand nine hundred and ninety-four (34,994) shares, of one hundred ($100) dollars each, of the fully paid common capital stock of the said The Toledo, Dupont and Western Railway Company.

2. And as and for further consideration for said purchase and conveyance of said portion of said railroad and property hereinbefore described, in addition to the thirty-four thousand nine hundred and

ninety-four (34,994) shares, of one hundred ($100) dollars
61 each, of the fully paid common capital stock of the said The Toledo, Dupont and Western Railway Company, hereinbefore provided to be executed, issued and delivered to said party of the first part herein, the said party of the second part hereby contracts, covenants and agrees that as soon as practicable, after the consolidation hereinbefore provided for in the second clause of this agreement, shall have been completed and perfected, the said consolidated company, owning and possessing the entire line of railroad and property now owned by the party of the first part, extending from Toledo, Ohio, to East St. Louis, Illinois, shall execute and issue as and for, and in full and complete payment of, the purchase price for the said railroad and property, and in consideration of and as and for, and in full and complete payment for, the broadening of the gauge, reconstructing of said railroad now owned by the party of the first part, from Toledo, Ohio, to East St. Louis, Illinois, and equip the same, as hereinabove provided and set forth, and for the purpose of exchanging some of said stock and securities with the holders of certain securities issued by the companies heretofore owning and controlling said railroad and property, or portions thereof, for the payment of certain debts, underlying liens, rights of way and other proper corporate purposes, the following securities, to wit:

1. An amount of fully paid common capital stock of said consolidated company equal to the aggregate amount of the common capital stock of the said three constituent companies of Ohio, Indiana and Illinois, entering into and forming said consolidated company. Said consolidated company shall also have authority to issue and shall issue, additional common capital stock to the amount of twenty-five thousand ($25,000) dollars per mile for each mile of additional main line or branch railroad that may hereafter be constructed by said consolidated company, between a point on said present line of railroad at or near Dupont, Ohio, and a point on said present line at or near Decatur, in the State of Indiana.

2. Said consolidated company shall execute and issue five million eight hundred and five thousand ($5,805,000) dollars of fully paid preferred coupon convertible stock for the purposes hereinbefore set forth.

3. Said consolidated company shall further execute and issue for the said purposes hereinbefore set forth nine million ($9,000,000) dollars par value of its first-mortgage six per cent. gold bonds, interest payable semi-annually; said bonds to mature at not exceeding thirty (30) years from and after the date thereof; said first mortgage
62 further providing for a further issue of bonds of like tenor and effect to an amount not exceeding eight hundred thousand ($800,000) dollars, to be issued at the rate of twenty thousand ($20,000) dollars per mile upon and whenever a new and additional line of standard-gauge railroad built and completed in all respects as hereinabove set forth shall be constructed between a point on said present line at or near Dupont, Ohio, and a point on said present line at or near Decatur, in the State of Indiana.

4. It is further hereby mutually covenanted and agreed by and

between the said party of the first part and the said party of the second part that this agreement shall be and become operative and binding upon the parties hereto their successors or assigns when and as soon as the same shall have been sanctioned, ratified, and adopted by the unanimous vote of all of the incorporated stock of the said The Toledo, Dupont and Western Railway Company at a meeting of the stockholders of said company at which all of the stockholders of said company are present either in person or by proxy.

In witness whereof the said party of the first part has hereunto set his hand and seal and the said party of the second part has caused its corporate seal to be hereunto affixed, and these presents to be duly signed by its president and attested by its secretary the day and year first above written.

[SEAL.] SYLVESTER H. KNEELAND. [L. S.]

THE TOLEDO, DUPONT AND WESTERN RAILWAY COMPANY,

By CLARENCE BROWN, *President.*

Attest: FREDERICK L. GEDDES, *Secretary.*

(Endorsement:) United States circuit court for the northern district of Ohio, western division. Continental Trust Company of the City of New York, complainants, against Toledo, St. Louis and Kansas City Railroad Company *et al.*, respondents. In the matter of the petition of Samuel Hunt, as reciever of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit. E. (E.) Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

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EXHIBIT F.

Agreement, made and entered into this first day of June, 1891, by and between the Toledo, St. Louis and Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part.

Whereas, a certain agreement, in writing, was made and entered into on or about the twenty-third day of January, 1886, by and between James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company of Ohio and Indiana, parties of the first part thereto, and Sylvester H. Kneeland, party of the second part thereto; and

Whereas, on or about the said twenty-third day of January, 1886, a certain other agreement was made and entered into by and between James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, as trustees of the first-mortgage bondholders of the Toledo, Cincinnati and St. Louis Railroad Company and said Kneeland; and

Whereas, pursuant to said two agreements above mentioned, the said Sylvester H. Kneeland caused to be organized a railroad corporation under the laws of the State of Ohio, and also caused to be

organized a like corporation under the laws of the State of Indiana, and also caused to be organized a like corporation under the laws of the State of Illinois, and thereafter caused said three corporations to be consolidated into a single corporation known and designated as the Toledo, St. Louis and Kansas City Railroad Company, and thereupon said consolidated corporation issued its securities pursuant to said agreements of January 23, 1886, and the same were delivered to and placed in the hands of two trustees selected as provided in said two agreements; and

Whereas, the party of the second part purchased the said line of railroad from Toledo to St. Louis; and

Whereas, all the property purchased by him at the foreclosure sale mentioned in said two agreements of January 23, 1886, became and is the property of said consolidated corporation; and

Whereas, the said Kneeland proceeded to rebuild and reconstruct said line of railroad from Toledo, to East St. Louis, and has heretofore received large payments of securities on account of said two agreements of January 23, 1886; and

64 Whereas, sundry disputes and controversies have arisen between the said Kneeland and the said consolidated corporation, concerning said Kneeland's performance of said two agreements of January 23, 1886, and also concerning other matters arising out of the dealings between the parties hereto previous to the date hereof; and

Whereas, the trustees mentioned in said two agreements of January 23, 1886, and their successors in trust, hold in their possession certain securities, consisting of first-mortgage bonds, preferred stock and common stock of said consolidated corporation, for the purposes of said two agreements; and

Whereas, the said Kneeland desires to procure the delivery to him of said securities, upon terms and conditions not precisely within the provisions of said two agreements of January 23, 1886, and to that end desires that the consent of the parties of the first part respectively to said two agreements of January 23, 1886, and of the two trustees appointed to take custody of, and to distribute the securities under said agreements, or their successors in trust, should be obtained to the delivery of said securities; and

Whereas, it is desired to settle all matters of difference between the said party of the first part and the said Kneeland, the party of the second part, and also all matters and things arising under said two agreements of January 23, 1886, between all the parties thereto.

Now, therefore, this agreement witnesseth, that the said Kneeland admits, represents and agrees that the interest coupons set forth in Schedule "A," hereto annexed, have been fully paid and satisfied by said corporation, and are now held by him subject to the order of said consolidated corporation, and upon a trust and duty to deliver the same to said consolidated corporation to be canceled, such delivery to be made as follows:

One-half of said coupons to be delivered within thirty days, and the remaining one-half to be delivered within sixty days from the

date hereof. Said Kneeland shall also pay the party of the first part sufficient money to meet outstanding coupons, not included in Schedule "A," and which are not met by the amount now on deposit for that purpose in the Bank of North America.

Said Kneeland not having fully completed the payment of the purchase-money under said foreclosure sale, because of the pendency of litigated claims, admits that he is liable to pay into court sufficient moneys in cash, on account of said purchase price, to pay all unpaid claims which have been or may hereafter be adjudi-
65 cated to be prior to the claims of the old first-mortgage bonds of the Toledo, Delphos and Burlington, and of the Toledo, Cincinnati and St. Louis Railroad Companies respectively.

The said consolidated corporation, party of the first part, and the said Sylvester H. Kneeland, party of the second part, agree to settle and liquidate all mutual claims and demands of every kind and description whatsoever, existing between said party of the first part and said party of the second part, excepting only said coupons and said unpaid purchase-money, and the claim in relation to water-front improvements in Toledo (all of which excepted matters are adjusted and disposed of by other provisions of this agreement), by the payment on the part of said Kneeland to the said consolidated corporation of the sum of three hundred and sixty-seven thousand dollars, which is to be received in compromise, satisfaction and accord of all claims and demands of every kind and description whatsoever, on the part of said consolidated corporation, against said Kneeland except as aforesaid.

And the said Kneeland hereby agrees to pay to said consolidated corporation the sum of three hundred and sixty-seven thousand dollars, as hereinafter provided. Said party of the second part agrees to pay the sum of two hundred and sixty thousand dollars as fast as the same shall be required by the party of the first part, to pay its maturing coupons of June 1, 1891. And the said party of the second part hereby covenants and agrees that the said outstanding coupons maturing at that date, which the party of the first part shall be called upon to pay, shall not exceed said sum of two hundred and sixty thousand dollars, and all in excess of said sum, which may be presented, the said party of the second part hereby agrees to pay, in addition. The remaining sum of one hundred and seven thousand dollars, the said party of the second part hereby agrees to pay to said party of the first part, from time to time, as the president of the said party of the first part may demand the same, but in any event, the whole amount of said sum of one hundred and seven thousand dollars shall be fully paid by said party of the second part, on or before six months after the date hereof.

And it is expressly agreed that the sum of one hundred thousand dollars out of said balance of one hundred and seven thousand dollars last mentioned, shall be set aside in the hands of the president of said party of the first part, as a specific fund for the com-
66 pletion of the road-bed and tracks of said party of the first part, the acquisition of land, construction of permanent betterments and the completion and equipment of machine shops.

And in consideration of the premises and of the covenants and promises of the party of the second part, the party of the first part hereto covenants and agrees, that it will make and execute its own notes to the aggregate amount of $250,000 payable to the order of the party of the second part, with interest at six per cent., four months after date, to be endorsed by the said party of the second part and to be delivered to the said party of the second part as hereinafter provided. The said parties hereto also consent that the said two trustees appointed under and by virtue of said two agreements of January 23, 1886, to take custody of and distribute the securities of said consolidated corporation, or their successors in trust, shall and may, and they hereby are requested by the parties hereto, to deliver to the party of the first part, upon the order of the said party of the second part, forthwith, first-mortgage bonds of the party of the first part, of the par value of one hundred thousand dollars, and ten thousand shares of the common stock of said party of the first part, which bonds and stock, when delivered, the said party of the first part hereby agrees to hold, in trust, and for the purpose of delivery to the said party of the second part as hereinafter provided.

The said party of the second part further agrees that upon the execution and delivery of this agreement he will forthwith deliver to said party of the first part, ten thousand shares of the common stock of said party of the first part, to be held by said party of the first part in trust and for the purposes of delivery to the said party of the second part, upon the terms and conditions hereinafter mentioned.

Said party of the first part further agrees that said notes of the party of the first part, endorsed by said party of the second part, together with said first-mortgage bonds of the par value of one hundred thousand dollars, and said twenty thousand shares of the common stock of the par value of two million dollars, held by it as aforesaid, shall be used by the said party of the second part, to raise moneys to go towards the payment of said sum of two hundred and sixty thousand dollars hereinbefore mentioned, and said notes with a proportionate part of said securities, shall be delivered to said party of the second part, as fast as he shall pay to said party of the first part, cash equal to the face amount of the notes delivered;
67 except that said party of the second part shall receive a first delivery of notes, with collateral, to the amount of thirty thousand dollars, at the time of the delivery of said ten thousand shares of stock, and he shall not be required to pay cash for said thirty thousand dollars in notes, until after the delivery of all the remaining notes and accompanying collateral as herein provided. Said notes, either original or renewed, of said party of the first part, shall be deemed to have been made for the accommodation of said party of the second part, and shall be paid by him at the maturity thereof and upon such payment shall be canceled, and the said party of the second part shall — upon be and become the sole and absolute owner of all the securities used as collateral with said notes to raise the moneys aforesaid; and all interest on said notes and expenses of negotiating the same incurred by the party of the second part in

negotiating or using the same, shall be borne by him without any claim therefor against the party of the first part. But in case the said party of the second part shall fail to pay any of said notes or the renewal notes herein authorized at the maturity thereof, then the securities pledged as collateral to said unpaid notes respectively, shall forthwith, without further act on the part of the said party of the second part, be and become the property of the party of the first part, and the same shall forthwith be sold to provide funds to pay said notes, and the said party of the second part shall be and become liable to the party of the first part, for any deficiency that shall remain unpaid from the proceeds of said sale, after paying all the expenses of said sale or prior claims.

And it is expressly understood and agreed that the assent of the trustees of the old first-mortgage bondholders under said two agreements of January 23, 1886, to the delivery of securities according to the plan of this agreement, is requested upon the express condition that there may be one renewal of four months, of said notes by the party of the first part, but no more.

All the rest and residue of the securities of the party of the first part, which shall remain in the hands of said two trustees appointed to take custody of said securities under said two agreements of January 23, 1886, or their successors in trust, the said parties hereto consent and hereby request that the said two trustees shall forthwith deliver to the Farmers' Loan and Trust Company of the City of New York, upon the execution by the said trust company of a declaration of trust to the effect that it agrees to receive and hold said securities in accordance with the trust hereby created;
68 and the said trust company shall thereupon hold the same in trust, as security for the payment of all purchase-money under said foreclosure sale, due from the party of the second part, to the extent of all claims upon the proceeds of said sale, which are prior to the claims of said old first-mortgage bonds of the said Toledo, Delphos and Burlington Railroad Company, of Ohio and Indiana, and of the Toledo, Cincinnati and St. Louis Railroad Company, respectively; and upon the further trust to pay over and deliver said securities to the said party of the second part, as fast as he shall pay said claims against said proceeds of the foreclosure sale, in the following manner, to wit: For each claim so paid by said party of the second part, the said Farmers' Loan and Trust Company shall deliver to the said party of the second part, preferred stock at twenty-five, to the amount of the moneys paid, until said preferred stock shall be fully delivered and thereafter, first-mortgage bonds, at par, to the amount of further claims paid, until all said bonds shall be delivered and thereafter upon the payment of the remaining claims, the entire balance of said common stock, and upon the full payment of all said claims against said purchase-money and said proceeds of said foreclosure sale, prior to the claims of said old first-mortgage bonds, then the said Farmers' Loan and Trust Company shall deliver to said party of the second part any and all securities which shall remain in its possession and which it received under said trust, as security for the payment of said claims,

and the same shall become the absolute property of the said party of the second part.

It is further agreed that all claims against said proceeds of the said foreclosure sale upon which there are outstanding adjudications decreeing them to be prior to the claims under the old first-mortgage bonds, shall, in the event that such adjudications are reversed, in such manner that said claims are finally disallowed and disposed of, be treated as claims actually paid by said party of the second part, and securities shall be delivered to him in the same manner as if said claims were paid, provided, that the said party of the second part shall have paid the said sum of one hundred and seven thousand dollars as herein agreed.

And it is further agreed by the parties hereto that no right of the said two trustees under said two agreements of January 23, 1886, to compensation for their services in the custody and distribution of securities, is hereby recognized or in any way admitted, but in the event that a court of competent jurisdiction shall allow to said two trustees any compensation out of said securities in their hands
69 which shall diminish the amount available for delivery to said Farmers' Loan and Trust Company such diminution shall not be deemed a partial failure of consideration for this agreement, nor shall it impair the binding force or effect thereof, it being understood that any compensation that is paid to said trustees shall come out of securities which would otherwise go to said Kneeland, or by direct payment from said Kneeland personally.

It is further agreed by the parties hereto, that fifteen hundred shares of common stock of the party of the first part, heretofore delivered by the party of the second part to the president of the party of the first part and now in his possession, shall, from and after the date hereof, be held by said president, as security for the payment of said sum of one hundred and seven thousand dollars, as hereinbefore provided, and upon the payment of said sum, shall thereupon be delivered up to the said Kneeland, free from all claims of said party of the first part.

And it is further agreed by the parties hereto, that all the legal expenses for counsel fees of the bondholders' committee, to said two agreements of January 23, 1886, in effecting this settlement and in preparing the agreement of settlement and in doing other necessary matters in respect thereto, shall be paid by the party of the first part, upon proper vouchers furnished. Said legal expenses to and including May 30, 1891, being fixed at $750 to which shall be added such reasonable amount as may be proper for further services in the same matter necessarily rendered.

And it is further agreed that all claims on the part of the party of the first part under this agreement or of the party of the first part under said two agreements of January 23, 1886, against the said party of the second part to this agreement, by reason of his alleged failure to provide proper terminal facilities for the party of the first part at Toledo, on the river front and the approaches thereto, shall be reserved and excepted from the matters and things which are settled

or liquidated by this agreement—being provided for by a separate agreement bearing even date hereunto.

It is further agreed by the parties hereto, that all the first-mortgage bonds and preferred and common stock of the party of the first part, heretofore placed in the custody of the two trustees under said two agreements of January 23, 1886, have been paid out and delivered by said trustees, properly, in accordance with their
70 duties and powers under said agreements, except in so far as they may have appropriated or taken securities for their own compensation and their administration of their duties under said agreement, is hereby approved and ratified with the exception aforesaid, the parties hereto reserving the right to question and dispute any claim of said trustees and also reserving the right to hold them liable for any securities taken by them for or on account of their compensation and in every way to dispute their right to take any of said securities for their compensation.

It is further agreed by the parties hereto, that the said party of the second part shall turn over and deliver the said line of road from Toledo to St. Louis to the said party of the said first part, and the party of the first part shall accept said road as of the date of December 31st, 1890; said road, as it now stands, to be accepted, together with the other matters and things herein agreed to be done by the said party of the first part, in lieu of and in satisfaction of the full performance of said two agreements of January 23, 1886; provided, however, that if said party of the second part shall fail to perform any of the provisions of this agreement, fully, according to the exact terms and tenor thereof, then and on that event said acceptance of said road shall be null and of no effect, and this agreement shall by force of the provisions hereof become void, *ab initio*, as a settlement. And all matters in dispute between the party of the first part and the party of the second part, or between the party of the second part and other persons interested in said two agreements of January 23, 1886, shall be reopened and reinstated, and all parties and persons shall be remitted to their mutual rights and relations, as they stood prior to the making of this agreement, and to all mutual claims existing at that time, which shall thereby revive; and any deliveries of securities or payments of money which may or shall have been made at the time such breach of this agreement shall occur, shall be deemed applicable as mutual credits and charges on the claims and accounts of said parties and persons, as they stood prior to the making of this agreement, and shall be accounted and settled for, as if this agreement had not been made; but the said two trustees under said two agreements of January 23, 1886, and their successors in trust shall be protected by this agreement to the extent of any securities which they may actually have delivered or given out, at the time of such breach, but not after such breach and notice thereof.

And it is further agreed that in the event that the said
71 party of the first part shall fail to perform any of the provisions of this agreement, then and in that event this agree-

ment shall, at the option of the party of the second part, be and become null and void, *ab initio*.

In testimony whereof, the party of the first part, by order of its board of directors, has caused its name to be signed hereto, by its president, and its corporate seal to be affixed and duly attested by its secretary, and the party of the second part has hereunto signed his name and affixed his seal, the day and year first above written.

This contract is executed in four copies.

TOLEDO, ST. LOUIS & KANSAS CITY R. R. CO.,
By S. R. CALLAWAY, *President*.

Attest: ISAAC WHITE, *Secretary*.

S. H. KNEELAND. [L. S.]

NEW YORK, *June* 2, 1891.

The Farmers' Loan & Trust Company of New York, hereby accepts the trust conferred upon it by the foregoing contract, between the Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, dated June 1, 1891, and agrees to receive, hold and deliver such securities as may be delivered to it thereunder, in accordance with the terms of said contract. Payments having been made, deliveries shall be made upon claims specified by the certificate of the president of the Toledo, St. Louis and Kansas City Railroad Company, and Sylvester H. Kneeland, showing that claims upon which deliveries are asked, and those included in the contract, and the certificate of the clerk of the circuit court of the United States, district of Indiana, that the claim paid is a claim upon the proceeds of the foreclosure sale, in court, and a lien and charge thereon prior to the lien of the old first-mortgage bonds, under which foreclosure was had; and upon such deliveries being made, in accordance with such orders, the Farmers' Loan and Trust Co. shall thereupon be fully discharged and released.

THE FARMERS' LOAN AND TRUST COMPANY,
By W. H. LEUPP, *2d V. P.*

The parties hereto hereby approve the foregoing acceptance by the Farmers' Loan and Trust Company and consent to the delivery of the securities in the manner therein provided.

June 2, 1891.

TOLEDO, ST. LOUIS & KANSAS CITY R. R. CO.,
By S. R. CALLAWAY, *President*.
S. H. KNEELAND.

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SCHEDULE "A."

Coupons out June 1, 1891.

No. 2	
No. 2	76
No. 4	176
No. 5	286
No. 6	286
No. 7	286
No. 8	1216
No. 9	1058
	1049
	4433

There are about $2,500 of No. 9 coupons, listed to be paid by bank that are still out and the bank holds $176.80 in money to pay them with.

This schedule is to be taken as tentative so far as coupon No. 9 is concerned, and shall be made to conform to the facts, Mr. Kneeland, claiming to hold but 1030 coupons not on the list at the Bank of North America, the amounts relating to the other numbers being admitted to be correct.

(Endorsement:) No. 1205. United States circuit court, for the northern district of Ohio, western division. Continental Trust Company of the City of New York, etc., complainants, against Toledo, St. Louis & Kansas City Railroad Company, *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit F. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

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EXHIBIT G.

Whereas, under and by virtue of an agreement made and entered into by and between the mortgage bondholders and creditors of the Toledo, Delphos & Burlington Railroad Company, and the mortgage bondholders and creditors of the Toledo, Cincinnati & St. Louis Railroad Company of Indiana and Illinois, parties of the first part, called the creditors, and James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck, parties of the second part, called the trustees, dated April 9th, 1884, said James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck are appointed trustees as therein provided; and,

Whereas, the said Charles W. Pierce thereafter resigned and Warren D. Hobbs was duly appointed trustee to succeed him; and,

Whereas, a certain agreement, in writing, was made and entered into on or about the twenty-third day of January, 1886, by and be-

tween James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, trustees for the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company of Indiana and Illinois, parties of the first part thereto, and Sylvester H. Kneeland, party of the second part thereto, and,

Whereas, by reason of circumstances which have arisen
74 since the last-mentioned contract was made and entered into, it has become impracticable to execute and carry out the purposes of said last-mentioned agreement of January 23, 1886, fully and strictly according to the exact terms thereof; and,

Whereas, it is necessary and expedient for the interests of all concerned in said last-mentioned agreement of January 23, 1886, that some change should be made in said last-mentioned agreement to the end that it may be carried out as nearly as practicable; and,

Whereas, the Toledo, St. Louis & Kansas City Railroad Company has made and entered into an agreement with Sylvester H. Kneeland, bearing date June 1st, 1891, wherein and whereby a certain settlement and adjustment is made of all matters in dispute between said Kneeland and said company, excepting certain matters specially reserved; and,

Whereas, the concurrence and consent of the parties of the first part to said last-mentioned agreement of January 23, 1886, is requested by the said The Toledo, St. Louis & Kansas City Railroad Company, and by said Sylvester H. Kneeland to the end that said settlement may be carried out; and said parties of the first part to said agreement are also requested to modify said last-mentioned agreement of January 23, 1886, to the extent requisite to enable the trustees to deliver said securities in accordance with the terms of said settlement.

Now, therefore, we, James M. Quigley, Halsey J. Boardman and Warren D. Hobbs as such trustees under said agreement of April 9th, 1884, and as parties of the first part to said last-mentioned agreement of January 23, 1886, hereby agree that said last-mentioned agreement of January 23, 1886, may and shall be so far modified as shall be requisite in order to permit and authorize the two trustees appointed to the custody and distribution of the securities mentioned in said last-mentioned agreement of January 23, 1886, to distribute and pay over the residue of said securities now remaining in their hands, in accordance with the terms of said settlement now agreed upon between said railroad company and said Kneeland, the said James M. Quigley, Halsey J. Boardman and Warren D. Hobbs as such trustees and parties to said last-mentioned agreement of January 23, 1886, hereby accepting for the persons whom they represent all the benefits of said settlement and of said agreement of settlement to which said beneficiaries are or may be entitled.

It being understood and agreed, however, that the consent and agreements of the said James M. Quigley, Halsey J. Boardman
75 and Warren D. Hobbs, herein contained are made and entered into upon the express condition that the said railroad company shall simultaneously with the delivery hereof, execute and

deliver an agreement in writing, between the Toledo, St. Louis and Kansas City Railroad Company, party of the first part thereto, Sylvester H. Kneeland, party of the second part thereto; James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos and Burlington Railroad Company of Ohio and Indiana, parties of the third part thereto, and James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, trustees for the first-mortgage bondholders of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, parties of the fourth part thereto, whereby the said railroad company shall agree to and with its preferred stockholders (being substantially the old first-mortgage bondholders or their successors, together with such additional holders of preferred stock as were not previously interested in said old first-mortgage bonds) that in case the earnings of said company which constitute part of its income, or any part thereof, shall at any time hereafter be used for betterments, improvements or additions to its property, ordinary maintenance excepted, as it now exists, or for the purpose of rolling stock or equipment, either directly or indirectly, then and thereupon the said railroad company shall issue within a reasonable time, and without undue delay, scrip dividends to the holders of the preferred stock of said company to an amount equal to the amount of earnings hereafter devoted to said betterments, additions, improvements, etc., provided however, that the amount of said scrip shall at no time exceed the amount of coupons of said stock which shall have matured and shall not have been paid, whether the same shall have been surrendered or not, the obligation to issue scrip therefor remaining, notwithstanding any such surrender; and from and after the date of such agreement the holders of coupons shall not be required or obligated to surrender the same until they shall have received payment therefor, either in cash or by such scrip as herein provided; said scrip to be paid not more than five years from the date hereof, and to bear interest at the rate of five per cent., and to be exchangeable at the option of the holders for any form of securities which the said company may hereafter issue. Said agreement shall be irrevocable and the right to receive such scrip is thereby to be given to the parties of the third and fourth parts thereto for the benefit of the preferred stockholders in lieu of
76 other matters and things which the said preferred stockholders or some of them claim that they might or would have received, or would or might have been entitled to receive, if said agreement of June 1st, 1891, had not been made, and if it had not been signed by the parties of the third and fourth parts to said agreement.

And said agreement shall also provide that the promises and covenants therein contained made by the parties of the first and second parts, shall be made and intended to be made for the benefit of the preferred stockholders, jointly and severally, and shall have the same effect as if the promises and covenants were made to the preferred stockholders, their executors and assigns, jointly and severally, and said preferred stockholders, were parties to this agree-

ment; it being understood that they shall be deemed privy to this agreement in all respects as though they were parties.

In witness whereof, we have hereunto set our hands and seals this first day of June, 1891.

JAMES M. QUIGLEY,
As Trustee as Aforesaid.
HALSEY J. BOARDMAN,
Acting as Trustee of First-mortgage Bondholders of T., C. & St. L. R. R. of Indiana and Illinois, Acting under Agreement of April 9th, 1884.

(Endorsement:) United States circuit court for the northern district of Ohio, western division. Continental Trust Company of the City of New York and another, complainants, against Toledo, St. Louis and Kansas City Railroad Company *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit. G. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

77 EXHIBIT H.

Whereas, under and by virtue of an agreement made and entered into by and between the mortgage bondholders and creditors of the Toledo, Delphos & Burlington Railroad Company, and the mortgage bondholders and creditors of the Toledo, Cincinnati & St. Louis Railroad Company, of Indiana and Illinois, parties of the first part, called the creditors, and James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck, parties of the second part, called the trustees, dated April 9th, 1884, said James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck are appointed trustees as therein provided; and

Whereas, the said Charles W. Pierce thereafter resigned and Warren D. Hobbs was duly appointed trustee to succeed him; and

Whereas, a certain agreement, in writing, was made and entered into on or about the twenty-third day of January, 1886, by and between James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company of Ohio and Indiana, parties of the first part thereto, and Sylvester H. Kneeland, party of the second part thereto; and

Whereas, by reason of circumstances which have arisen since the said last-mentioned contract was made and entered into, it has become impracticable to execute and carry out the purposes of said last-mentioned agreement of January 23, 1886, fully and strictly according to the exact terms thereof; and

Whereas, it is necessary and expedient for the interests of all concerned in said last-mentioned agreement of January 23, 1886, that some change should be made in said last-mentioned agreement to the end that it may be carried out as nearly as practicable; and,

Whereas, the Toledo, St. Louis & Kansas City Railroad Company has made and entered into an agreement with Sylvester H. Kneeland, bearing date June 1st, 1891, wherein and whereby a certain settlement and adjustment is made of all matters in dispute between said Kneeland and said company, excepting certain matters specially reserved; and,

78 Whereas, the concurrence and consent of the parties of the first part to said last-mentioned agreement of January 23, 1886, is requested by the said The Toledo, St. Louis & Kansas City Railroad Company and by said Sylvester H. Kneeland to the end that said settlement may be carried out; and said parties of the first part to said agreement are also requested to modify said last-mentioned agreement of January 23, 1886, to the extent requisite to enable the trustees to deliver said securities in accordance with the terms of said settlement;

Now, therefore, we, James M. Quigley, Charles T. Harbeck and John McNab, as such trustees, under said agreement of April 9th, 1884, and as parties of the first part to said last-mentioned agreement of January 23, 1886, hereby agree that said last-mentioned agreement of January 23, 1886, may and shall be so far modified as shall be requisite in order to permit and authorize the two trustees appointed to the care and distribution of the securities mentioned in said last-mentioned agreement of January 23, 1886, to distribute and pay over the residue of said securities now remaining in their hands, in accordance with the terms of said settlement now agreed upon between said railroad company and said Kneeland; the said James M. Quigley, Charles T. Harbeck and John McNab, as such trustees and parties to said last-mentioned agreement of January 23, 1886, hereby accepting for the persons whom they represent all the benefits of said settlement and of said agreement of settlement to which said beneficiaries are or may be entitled.

It being understood and agreed, however, that the consent and agreements of the said James M. Quigley, Charles T. Harbeck and John McNab, herein contained, are made and entered into upon the express condition that the said railroad company shall simultaneously with the delivery hereof execute and deliver an agreement, in writing, between the Toledo, St. Louis and Kansas City Railroad Company, party of the first part thereto; Sylvester H. Kneeland, party of the second part thereto; James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos and Burlington Railroad Company of Ohio and Indiana, parties of the third part thereto, and James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, trustees for the first-mortgage bondholders of the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, parties of the fourth part thereto, whereby the said railroad company shall agree to

79 and with its preferred stockholders (being substantially the old first-mortgage bondholders or their successors, together with such additional holders of preferred stock as were not previously interested in said old first-mortgage bonds); that in case the earnings of said company which constitute part of its income, or any

part thereof, shall at any time hereafter be used for betterments, improvements or additions to its property, ordinary maintenance excepted, as it now exists, or for the purpose of rolling stock or equipment, either directly or indirectly, then and thereupon the said railroad company shall issue within a reasonable time and without undue delay, scrip dividends to the holders of the preferred stock of said company, to an amount equal to the amount of earnings hereafter devoted to said betterments, additions, improvements, etc., provided, however, that the amount of said scrip shall at no time exceed the amount of coupons of said stock, which shall have matured and shall not have been paid whether the same shall have been surrendered or not, the obligation to issue scrip therefor remaining, notwithstanding any such surrender; and from and after the date of such agreement the holders of coupons shall not be required or obligated to surrender the same until they shall have received payment therefor, either in cash or by such scrip as herein provided; said scrip to be paid not more than five years from the date hereof, and to bear interest at the rate of five per cent., and to be exchangeable at the option of the holders for any form of securities which the said company may hereafter issue. Said agreement shall be irrevocable and the right to receive said scrip is thereby to be given to the parties of the third and fourth parts thereto for the benefit of the preferred stockholders in lieu of other matters and things which the said preferred stockholders or some of them claim that they might or would have received, or would or might have been entitled to receive, if said agreement of June 1st, 1891, had not been made, and if it had not been signed by the parties of the third and fourth parts to said agreement.

And said agreement shall also provide that the promises and covenants therein contained made by the parties of the first and second parts, shall be made and intended to be made for the benefit of the preferred stockholders, jointly and severally, and shall have the same effect as if the promises and covenants were made to the preferred stockholders, their executors and assigns, jointly and severally, and said preferred stockholders were parties to this agreement; it being understood that they shall be deemed
80 privy to this agreement in all respects as though they were parties.

In witness whereof, we have hereunto set our hands and seals this first day of June, 1891.

JAMES M. QUIGLEY,
As Trustee as Aforesaid.
CHARLES T. HARBECK,
As Trustee as Aforesaid.
JOHN McNAB,
As Trustee as Aforesaid.

(Endorsement:) United States circuit court for the northern district of Ohio, western division. Continental Trust Company of the City of New York and another, complainants, against Toledo, St. Louis and Kansas City Railroad Company *et al.*, respondents.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit. H. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

EXHIBIT I.

Whereas, on or about the first day of June, 1891, a certain agreement of settlement was made and entered into by and between the Toledo, St. Louis and Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part, and

Whereas, said agreement was consented to by James M. Quigley, Charles T. Harbeck and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos and Burlington Railroad Company, of Ohio and Indiana, and also by James M. Quigley and Halsey J. Boardman, a majority of the trustees of the first-mortgage bondholders of the Toledo, Cincinnati and St. Louis Railroad Company, acting for the three trustees of said bondholders, to wit; James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, and

Whereas, said agreement contains a provision for absolute forfeiture *ab initio*, by reason of the failure of the said Kneeland,
81 to do any of the acts or things therein agreed to be done or performed by him, and also provided for forfeiture, at the option of said Kneeland, in case of any breach by the said railroad company, party of the first part thereto; and

Whereas, it is claimed by some persons interested in said agreement that a default has already occurred in certain matters to be done thereunder by the said Kneeland, but it is desired to waive such default, if any.

Now, therefore, in consideration of all the matters and things set forth in said agreement of June 1, 1891, between the said railroad company and the said Kneeland, and in the agreement supplemental thereto, bearing the same date, and in the consents of the said trustees for the respective bondholders as aforesaid, and in further consideration of the waiver of the default claimed to have been made by the said Kneeland, it is mutually agreed by and between the said The Toledo, St. Louis and Kansas City Railroad Company, party of the first part, and the said Sylvester H. Kneeland, party of the second part, that said provisions in said contract of June 1, 1891, between the said railroad company and the said Kneeland, providing that said contract shall or may become void by reason of a breach, whether by the party of the first part or by the party of the second part, upon any option or otherwise, shall be stricken from the said agreement; and said agreement of June 1, 1891, shall be and the same hereby is amended so that it shall be absolute in its terms, and that the only remedy of either party, for any breach thereof, shall be by action founded upon the contract, whether for

damages or for specific performance or otherwise, as the case may require.

And it is further agreed, upon the same consideration, that the said agreement of June 1, 1891, shall be further amended, by adding the following provision thereto, viz.:

That in the event that said Kneeland shall fail to pay said sum of $107,000 mentioned in said agreement of June 1, 1891, within six months, as provided in said agreement, then and in that event, the said railroad company shall not be entitled to receive payment or collect said sum from said Kneeland; and the said Kneeland shall forthwith pay the said sum to the Farmers' Loan and Trust Company, as trustee, for the benefit of the railroad company and the bondholders and preferred stockholders and common stockholders thereof, and of all other persons interested in the application of said fund, for the uses mentioned in said agreement of June 1, 1891; and in the event that said Kneeland shall fail to pay said sum of
82 the Farmers' Loan and Trust Company, within thirty days from and after the expiration of said period of six months, then it shall be and become the duty of the Farmers' Loan and Trust Company, to sue for and use all practical means to recover said sum of $107,000 from the said Kneeland, of which sum, after paying all expenses of collection and the services of said trustee, $100,000 shall be paid out for betterments and additions to the track and road-bed and for the terminal property of the said railroad company, in accordance with the provisions of said contract of June 1, 1891; such payments to be made upon vouchers furnished by the president of the company, with a certificate by said president that the betterments or additions mentioned in the voucher, have been fully completed and are fairly and fully worth, at the ordinary rates, the sum mentioned in the voucher.

In case the said Farmers' Loan and Trust Company shall decline to accept this trust, then the trustee may be appointed by a majority of all the members of both bondholders' committees taken together, to be a trust company if any of good standing will accept.

The balance of said $107,000, if any, shall be paid over by the trustee to the said railroad company, party of the first part.

And the said common stock of the par value of $150,000, held by the said president as collateral, for the payment of said sum of $107,000, shall, at the expiration of six months, if said sum remains unpaid, be turned over to said trust company to be held by it as collateral, for the payment of said sum, and said president, while he continues to hold said stock, shall continue to hold it, as trustee, under this agreement and not by virtue of his office as president, and shall not be subject to instructions of the board of directors in the performance of his trust.

A majority of the members of said two bondholders' committees, collectively, shall also have power to appoint a trustee, in case of a vacancy through any cause; said trustee, to be a trust company, if any of good standing will accept.

In witness whereof, the said railroad company has caused these presents to be signed by its president and its corporate seal to be

hereunto affixed, and the said Kneeland has hereunto set his hand and seal this third day of June, 1891.

TOLEDO, ST. LOUIS & KANSAS CITY R. R. CO.,
By S. R. CALLAWAY, *President.*

Attest:

ISAAC W. WHITE, *Secretary.*
S. H. KNEELAND. [L. S.]

83 (Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc., complainant, *vs.* Toledo, St. Louis and Kansas City R. R. Co., *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit I. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed, May 28, 1900, Irvin Belford, clerk.

EXHIBIT J.

Whereas, on or about the first day of June, 1891, a certain agreement was made and entered into by and between the Toledo, St. Louis & Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part; and

Whereas, on the same day a certain supplemental agreement between the same parties was made and entered into; and

Whereas, on the same day a consent of the trustees of the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company to said agreement was duly given by an instrument in writing; and

Whereas, on the third day of June, 1891, said first-mentioned agreement and said agreement supplemental thereto were modified by an amended agreement made and entered into by and between the said The Toledo, St. Louis and Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part,

Now therefore, we, James M. Quigley, Halsey J. Boardman and Warren D. Hobbs, trustees for the first-mortgage bondholders of the Toledo, Cincinnati & St. Louis Railroad Company, acting by James M. Quigley and Halsey J. Boardman, a majority of said trustees, duly authorized thereto, in consideration of the promises, do hereby consent and agree to said amended agreement of June 3, 1891, and to the modification of said original agreement of June 1, 1891, and the agreement supplemental thereto, according to the terms of said amended agreement, and that the same shall be carried out as so amended.

In witness whereof, we have hereunto set our hands and seals the fourth day of June, in the year 1891.

84 JAMES M. QUIGLEY,
Chairman Trustees 1st-Mtge. Bondholders T., C. & St. L. R. R., Acting under Deed of Trust of April 9th, 1884.

HALSEY J. BOARDMAN,
As Trustee of First-mortgage Bondholders of T., C. & St. L. R. R. of Indiana and Illinois, Acting under Agreement of April 9th, 1884.

(Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc., complainant, *vs.* Toledo, St. Louis and Kansas City R. R. Co., *et al.*, respondents. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit J. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed, May 28, 1900, Irvin Belford, clerk.

EXHIBIT K.

Whereas, on or about the first day of June, 1891, a certain agreement was made and entered into by and between the Toledo, St. Louis & Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part; and

Whereas, on the same day a certain supplemental agreement between the same parties was made and entered into; and

Whereas, on the same day a consent of the trustees of the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company to said agreement was duly given by an instrument in writing; and

Whereas, on the third day of June, 1891, said first-mentioned
85 agreement and said agreement supplemental thereto were modified by an amended agreement made and entered into by and between the said The Toledo, St. Louis and Kansas City Railroad Company, party of the first part, and Sylvester H. Kneeland, party of the second part.

Now, therefore, we, James M. Quigley, Charles T. Harbeck, and John McNab, trustees for the first-mortgage bondholders of the Toledo, Delphos & Burlington Railroad Company, acting by James M. Quigley, and Charles T. Harbeck a majority of said trustees, duly authorized thereto in consideration of the promises, do hereby consent and agree to said amended agreement of June 3, 1891, and to the modification of said original agreement of June 1, 1891, and the agreement supplemental thereto, according to the terms of said amended agreement, and that the same shall be carried out as so amended.

In witness whereof, we have hereunto set our hands and seals the fourth day of June, in the year 1891.

CHARLES T. HARBECK,
Trustee under Agreement of April 9th, 1884, for Toledo, Delphos & Burlington Bondholders.

JAMES M. QUIGLEY,
Chairman and Trustee under Agreement of April 9, 1884, for Certain Toledo, Delphos & Burlington R. R. 1st-mortgage Bondholders.

(Endorsement:) Circuit court of the U. S. northern dist. of Ohio, west. div. Continental Trust Company of the City of New York, etc., complainant, *vs.* Toledo, St. Louis and Kansas City R. R. Co. *et al.*, respondents. In the matter of the petition of Samuel Hunt, as

receiver of the Toledo, St. Louis and Kansas City Railroad Company. Exhibit K. Clarence Brown, solicitor for receiver, Toledo, Ohio. Filed. May 28, 1900. Irvin Belford, clerk.

86 (Entered) Thursday, May 31, 1900.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents. } No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

This day comes Samuel Hunt, receiver of the Toledo, St. Louis and Kansas City Railroad Company by Clarence Brown, his solicitor, and presents to the court his intervening petition filed herein on the 28th day of May, 1900, upon consideration whereof, and on motion of his solicitor it is,

Ordered that the complainant Continental Trust Company of the City of New York, the respondents Toledo, St. Louis and Kansas City Railroad Company and Jules S. Bache, the cross-respondent Sylvester H. Kneeland, and Morton S. Paton, and Richard B. Hartshorne, the purchasers of the mortgaged premises, demur or plead to said petition or answer the same within twenty days from the date of the entry of this order; and it is further

Ordered that the clerk of this court forthwith mail to said Continental Trust Company of the City of New York, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, Morton S. Paton and Richard B. Hartshorne, addressed to them at their several offices, certified copies of this order.

Dated May 29, 1900, at chambers in the city of Cleveland, O.

A. C. THOMPSON,
U. S. Dist. Judge, Sitting by Designation.

87 Certified copies of the foregoing order were this day, May 31st, '00, at 2 o'clock p. m. deposited in the post-office at Toledo, Ohio, under official envelopes, addressed as follows, to wit:

Continental Trust Co., 30 Broad St., New York city, N. Y.
Richard B. Hartshorne, Esq., 35 Wall St., New York city, N. Y.
Morton S. Paton, 1 Broadway, New York city, N. Y.
Toledo, St. Louis & Kansas City Railroad Co.
Charles Milles, pres't, 18 Broadway, N. Y. city, N. Y.
Jules S. Bache, 30 Broad St., New York city, N. Y.
Sylvester H. Kneeland, 18 Broadway, New York city, N. Y.
Attest:
J. W. WILSON,
Deputy Clerk.

88 June Term, A. D. 1900, to wit, June 9, 1900.

Present: The Honorable Augustus J. Ricks, U. S. district judge.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

This day comes Samuel Hunt, receiver of the Toledo, St. Louis and Kansas City Railroad Company by Clarence Brown, his solicitor, and presents to the court his intervening petition filed herein on the 28th day of May, 1900, upon consideration whereof, and on motion of his solicitor, it is

Ordered that the Farmers' Loan and Trust Company demur, or plead to said petition, or answer the same within twenty (20) days from the date of the entry of this order; and it is further

Ordered that the clerk of this court forthwith mail to said Farmers' Loan and Trust Company, addressed to it, at its office a certified copy of this order.

Dated June 9th, 1900, in the city of Toledo, Ohio.

Certified copy of above order mailed Farmers' Loan and Trust Co., 62 Williams St., New York city, N. Y., June 9, 1900.

Attest: J. W. WILSON,
Deputy Clerk.

89 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents. } No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

It is hereby stipulated that the time of the respondents, The Continental Trust Company of the City of New York, Morton S. Paton and Richard B. Hartshorne, in which to answer, demur or plead to the petition of Samuel Hunt, receiver filed herein on the 28th day of May, 1900 be and the same is hereby extended to and including July 10, 1900.

6, 15, '00.

CLARENCE BROWN,
Solicitor for Sam'l Hunt, Receiver, Petitioner.

(Endorsement:) No. 1205. U. S. circuit court, northern dist. of Ohio, western division. Continental Trust Co. *vs.* Toledo, St. Louis & Kansas City R. R. Co. Stipulation extending time to plead. Filed. Jun- 19, 1900 Irvin Belford, clerk.

90 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents. } No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

It is hereby stipulated that the time of the respondents, The Continental Trust Company of the City of New York, Morton S. Paton and Richard B. Hartshorne, in which to answer, demur or plead to the petition of Samuel Hunt, receiver, filed herein on the 28th day of May, 1900, be and the same hereby is extended to and including July 30th, 1900.

7/9/00.

CLARENCE BROWN,
Solicitor for Sam'l Hunt, Receiver, Petitioner.

(Endorsement:) No. 1205. U. S. circuit court. Northern dist. of Ohio, western division. Continental Trust Co. *vs.* Toledo, St. Louis & Kansas City R. R. Co. Stipulation extending time to plead. Filed. Jul- 12, 1900 Irvin Belford, clerk.

91 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE City of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY Railroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE City of New York *et al.*, Cross-respondents.	Cross-bill.

To the circuit court of the United States for the northern district of Ohio, western division:

The petition of James N. Wallace respectfully shows as follows:

First. Pursuant to the provisions of the decree of foreclosure and sale entered in this cause and dated the 1st day of April, 1898, and to the decree, entered in this cause dated November 11th, 1899, modifying said decree of April 1st, 1898, and to the decretal order entered January 19th, 1900, in this cause, and to the further decree entered in this cause on said January 19th, 1900, re-entering and confirming said decree of November 11th, 1899, Frank H. Shaffer and Merrill Moores, special masters, for that purpose appointed, made sale of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company on the 27th day of March, 1900, and at said sale Morton S. Paton and Richard B. Hartshorne became the purchasers thereof for the sum or price of $12,200,000, and said purchasers on the acceptance of their bid, paid to the special masters, in accordance with the terms and conditions of sale, the sum of $75,000.

Second. Said special masters duly filed in this court a report of said sale on or about the 2nd day of April, 1900, and by order entered in this cause on the 18th day of April, 1900, said
92 report of said special masters was in all things approved, and the said sale made by them to said Morton S. Paton and Richard B. Hartshorne was in all things ratified, approved, confirmed and made absolute.

To provide for the payment by them of the purchase price said purchasers have since delivered to the special masters, in pursuance of said order of confirmation, certificates of the Continental Trust Company of the City of New York that said trust company holds, subject to the order of said special masters, first-mortgage bonds of the Toledo, St. Louis and Kansas City Railroad Company, as follows:

$8,823,000 par value of said bonds, each bearing the coupon maturing June 1st, 1893, and subsequent coupons.

$3,000 par value of said bonds, each bearing the coupon maturing December 1st, 1893, and subsequent coupons.

Third. By said orders of confirmation it is provided that said purchasers shall have the right to assign their interest, as an entirety, or in parcels as said purchasers may determine, that upon filing such assignments with said special masters, said special masters shall make their deed or deeds of conveyance accordingly, and that in the event of any assignment by said purchasers of their said bid or interest or any conveyance by them of said railroad, equipment, franchises or property so purchased by them, all obligations incurred by said purchasers on account of the purchase of said railroad, equipment, franchises and property may be transferred to and assumed by such transferee or transferees, grantee or grantees, and thereupon said purchasers shall individually be discharged from all such obligations and liability.

Fourth. Thereafter, said Morton S. Paton and Richard B. Hartshorne executed and delivered to your petitioner an assignment bearing date the fifth day of June, 1900, of their said bid, and of all and singular their right, title, and interest, as such purchasers, in and to said railroad, equipment, franchises, and property purchased by them, and therein and thereby requested said special masters to make to said assignee a deed of said railroad, equipment, franchises and property. Said assignment has been duly filed with
93 said special masters.

Fifth. All obligations incurred by said purchasers on account of the purchase of said railroad, equipment, franchises and property, have been transferred to and have been assumed by your petitioner, said assignee of said bid, and your petitioner has become the successor in right and obligation, of said Morton S. Paton and Richard B. Hartshorne, as such purchasers, and has assumed and has become liable for all obligations incurred by said Paton and Hartshorne on account of the purchase of said railroad, equipment, franchises and property.

The petitioner therefore, prays that he may be made a party to this cause, and that said Morton S. Paton and Richard B. Hartshorne may be dismissed from the record as such purchasers, and be discharged from all obligations incurred by them on account of the purchase by them of said railroad, equipment, franchises and property.

JAMES N. WALLACE, *Petitioner.*

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
State of New York, County of New York, } *ss:*

James N. Wallace, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and that the allegations therein contained, so far as they relate to his own acts, are true, and

so far as they relate to the acts of others, he believes them to be true; that in regard to all matters & things in the foregoing petition alleged which are not within the personal knowledge of deponent, deponent has been fully informed, and believes the same to be true.

JAMES N. WALLACE.

Subscribed and sworn to this 30th day of June, 1900.
[SEAL.]
CHAS. FLYNN,
Notary Public, New York County.

(Endorsement:) Filed. July 13, 1900. Irvin Belford, clerk.

94 (Entered) Friday, July 13, 1900.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.
} No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.
} Cross-bill.

Order.

Now this day comes James N. Wallace, by Butler, Notman, Joline & Mynderse, his solicitors and presents to the court his petition to be made a party to this cause as the successor in right and obligation to Morton S. Paton and Richard D. Hartshorne, the purchasers of the mortgaged premises, and in substitution for said purchasers, and that said purchasers be dismissed from the record as such purchasers and be discharged from all obligations incurred by them on account of the purchase by them of the railroad, equipment, franchises and property, constituting the mortgaged premises.

And also the complainant, Continental Trust Company of the City of New York, by Cary & Whitridge, its solicitors, and said Morton S. Paton, and Richard B. Hartshorne, by E. C. Henderson, their solicitor, and all and singular the matters contained in said petition being considered and by the court fully understood, it is

Ordered and decreed that said petition be, and the same hereby is, granted.

It is further ordered and decreed that said petitioner be, and he hereby is, made a party to this cause as the successor in right and obligation to said Paton and Hartshorne, as purchasers as aforesaid, and that he be bound by all proceedings taken herein since the 17th

day of April, 1900, including the order of confirmation of sale made on said last-named date; and it is further

95 Ordered and decreed that said Morton S. Paton and Richard B. Hartshorne be, and they hereby are, dismissed from the record as such purchasers, and that they be, and they hereby are, discharged from all obligations incurred by them on account of the purchase by them of said railroad, equipment, franchises and property constituting the mortgaged premises.

Dated July —, 1900.

(Endorsed:) "A. c t" (A. C. Thompson, judge.)

We consent to the entry of the foregoing order.
Dated June 30, 1900.

CARY & WHITRIDGE,
Sol'rs for Comp.
E. C. HENDERSON,
Sol'r for Paton & Hartshorne.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis & Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.

In the matter of the petition of Toledo, St. Louis & Western Railroad Company.

To the circuit court of the United States for the northern district of Ohio, western division:

The petition of the Toledo, St. Louis and Western Railroad Company respectfully shows as follows:

First. Your petitioner is a corporation duly incorporated under and pursuant to the provisions of the act of the legislature of the State of Indiana approved March 3rd, 1865, entitled "An act
96 to authorize, regulate and confirm the sale of railroads, to enable purchasers of the same to form corporations and to exercise corporate powers, and to define their rights, powers and privileges, and to enable such corporations to purchase and con-

struct connecting and branch roads, and to operate and maintain the same," and the acts supplemental thereto and amendatory thereof.

Your petitioner has made the certificate required by the laws of the State of Ohio to enable your petitioner to transact the business for which it was incorporated, within said State of Ohio, and has forwarded the same for filing in the office of the secretary of state of the State of Ohio, together with a sworn copy of its articles of incorporation, and your petitioner has made the *sworn statement* required by the laws of the State of Illinois, to enable it to carry on the business for which it was incorporated, within said State of Illinois, and has forwarded the same for filing in the office of the secretary of state of the State of Illinois, together with a duly certified copy of its articles of incorporation.

Second. Your petitioner has acquired, or is about to acquire, and has made application to this court to be put in possession, or, all and singular the property formerly belonging to the Toledo, St. Louis and Kansas City Railroad Company, pursuant to the decree of foreclosure and sale entered in this cause, and dated the first day of April, 1898, and to the decree entered in this cause dated November 11th, 1899, modifying said decree of April 1st, 1898, and to the decretal order entered January 19th, 1900, in this cause, and to the further decree entered in this cause on said January 19th, 1900, re-entering and confirming said decree of November 11th, 1899.

Third. That heretofore, and on or about the 28th day of May, 1900 Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, duly filed with this court in this cause his certain petition, praying the decree of this court that the said receiver be entitled out of certain first-mortgage bonds and pre-
97 ferred stock and common stock of said Toledo, St. Louis and Kansas City Railroad Company in the hands of said Farmers' Loan and Trust Company, to be reimbursed for certain sums of money in said petition mentioned, with interest thereon, which said petitioner and his predecessors in the receivership in *in* the above-entitled cause of said Toledo, St. Louis and Kansas City Railroad Company had paid in respect of certain prior claims stated in said petition, whether for principal or interest, and that said bonds and stock, both preferred and common, towards satisfaction thereof, be delivered to the said petitioner to be by him delivered as part of the mortgaged premises, to the purchasers of the mortgaged premises purchased at said sale thereof, made under said decrees of foreclosure of said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, or that said securities be sold, and the proceeds thereof paid to said petitioner for payment by him to said purchasers of the mortgaged premises, or to be paid to said purchasers, and for such other and further relief as may be just. Your petitioner prays leave to refer to the original petition of the said Samuel Hunt, as receiver of the properties of the Toledo, St. Louis and Kansas City Railroad Company on file in the records of this court as aforesaid.

Fourth. That your petitioner has succeeded to all and every the rights of the Toledo, St. Louis and Kansas City Railroad Company,

said Samuel Hunt as receiver of the property of said Toledo, St. Louis and Kansas City Railroad Company and the purchasers at the sale under foreclosure of the line of railroad, properties, rights, privileges and franchises formerly belonging or appertaining to the said Toledo, St. Louis and Kansas City Railroad Company in respect to all the securities, properties and choses in action as stated and set forth in said petition of Samuel Hunt as receiver of the properties of the Toledo, St. Louis and Kansas City Railroad Company, *except as to* the line of railroad and appurtenant franchises and property situated in the State of Illinois, the title to which is to be conveyed by Toledo, and East St. Louis Railroad Company to your petitioner in pursuance of the plan of reorganization of the Toledo, St. Louis and Kansas City Railroad Company.

98 Your petitioner therefore prays that it may be made a party to this cause, and that it may be substituted as petitioner therein in the place and stead of Samuel Hunt as receiver of the Toledo, St. Louis and Kansas City Railroad Company, and that said Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company may be dismissed from the record as such petitioner; all without prejudice to any of the proceedings had or to be had herein.

TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
By ALBERT RATHBONE,
President, Petitioner.

[Corporate Seal.]

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for Petitioner.

UNITED STATES OF AMERICA, }
State of New York, County of New York, } *ss:*

Albert Rathbone, being duly sworn, deposes and says that he is the president of The Toledo, St. Louis and Western Railroad Company, the petitioner named in the foregoing petition. That he has read the same and knows the contents thereof, and that the allegations therein contained, so far as they relate to his own acts or acts of said Toledo, St. Louis and Western Railroad Company, are true, and so far as they relate to the acts of others, he believes them to be true. That in regard to all matters and things in the foregoing petition alleged which are not within the personal knowledge of deponent, deponent has been fully informed and believes the same to be true.

ALBERT RATHBONE.

Subscribed and sworn to this 25th day of July, 1900.
[SEAL.]
CHAS. FLYNN,
Notary Public, New York County.

(Endorsement:) No. 1205. U. S. circuit court, northern dist. of Ohio, western division. Continental Trust Co. *et al. vs.* Toledo, St.

Louis & Kansas City R. R. Co. *et al.* Petition for order of substitution. Butler, Notman, Joline & Mynderse, New York city. Filed. Jul- 27, 1900. Irvin Belford, clerk.

99 June term, A. D. 1900, to wit, July 28, 1900.

Present: The Honorable A. C. Thompson, U. S. district judge, sitting by designation.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.
No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, and S. H. Kneeland, Cross-respondents.
Cross-bill.

Order.

Now this day comes Toledo, St. Louis and Western Railroad Company by Butler, Notman, Joline & Mynderse, its solicitors and presents to this court its petition to be made a party to this cause and to be substituted as petitioner herein, in the matter of the petition of Samuel Hunt, receiver, against the Farmers' Loan and Trust Company and others, in the place and stead of Samuel Hunt, as receiver of the properties of the Toledo, St. Louis and Kansas City Railroad Company, without prejudice to the proceedings had or to be had herein.

And also comes Samuel Hunt, as receiver of the properties of the Toledo, St. Louis and Kansas City Railroad Company by Clarence Brown, his counsel, and all and singular the matters contained in said petition, being considered and by the court fully understood, it is

Ordered and decreed that said petition be, and the same hereby is, granted. It is further

Ordered and decreed that said petitioner, Toledo, St. Louis and Western Railroad Company be, and it hereby is, made a party to this cause and the petitioner, in the matter of the petition of Samuel Hunt, receiver, *vs.* Farmers' Loan and Trust Company and
100 others, as the successor in right to said Toledo, St. Louis and Kansas City Railroad Company, Samuel Hunt as receiver of the properties of the Toledo, St. Louis and Kansas City Railroad Company and the purchasers of the line of railroad, rights, privileges and franchises of the Toledo, St. Louis and Kansas City Rail-

road Company at the foreclosure sale thereof, and in the place and stead of the said Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, without prejudice to the proceedings had or to be had herein.

And thereupon came said petitioner and dismissed its said petition as against the defendants Morton S. Paton and Richard B. Hartshorne.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, against The Farmers' Loan & Trust Company *et al.*, respondents.

The answer of the Continental Trust Company of the City of New York, to the petition of Samuel Hunt, receiver, filed herein on the 28th day of May, 1900, respectfully shows as follows:

101 This respondent is informed and believes that the allegations of said petition are true, and submits its rights in the premises to the court and prays such decree as to the court shall seem just.

[Corporate Seal.]

CONTINENTAL TRUST COMPANY
OF THE CITY OF NEW YORK,
By GORDON MACDONALD, *V. P.*

CARY & WHITRIDGE,
Solicitors for said Trust Co.,
59 *Wall Street, New York.*
E. C. HENDERSON, *Of Counsel.*

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, } *ss.:*

Gordon Macdonald being duly sworn, deposes and says that he is vice-president of The Continental Trust Company of the City of New

York, the above-named respondent; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

GORDON MACDONALD.

Sworn to before me this 26th day of June, 1900.
[SEAL.]

JOHN FRENCH,
Notary Public, New York County.

Endorsement: 1205. United States circuit court, for the nor. dist. of Ohio, W. D. Continental Trust Co. of New York *vs.* Toledo, St. Louis & Kansas City R. R. Co. *et al.*—Charles Hamlin *et al. vs.* Continental Trust Co. of New York. In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City R. R. Co. Answer of Continental Trust Co. Cary & Whitridge, solicitors for Continental Trust Co. 59 Wall street, New York, N. Y. Filed. Jul- 27, 1900. Irvin Belford, clerk.

102 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *against* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205.	In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *against* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.	

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

Plea of Jules S. Bache to the Jurisdiction of the Court of His Person and of the Subject-matter of the said Petition of Samuel Hunt.

103 The above-named Jules S. Bache, specially appearing under protest for the purpose of this plea and for no other, says that this court has no jurisdiction of his person or of the subject-matter of the petition of Samuel Hunt as receiver above referred to, or to grant any of the relief prayed for in said petition, for that:

First. On the 17th day of May, 1900, he, the said Jules S. Bache, commenced an action in the supreme court of the State of New York in the county of New York, against Sylvester H. Kneeland, Toledo,

St. Louis and Kansas City Railroad Company and the Farmers' Loan & Trust Company by making personal service, pursuant to the statutes of the State of New York in such case made and provided, of the summons and complaint in said action (copies of which are hereunto annexed and marked respectively Exhibits "A" and "B" and made part hereof) on all of said defendants and each of them, within the county of New York and the State of New York.

Second. The matters and things alleged and set forth in said complaint are true.

Third. On the 23rd day of May, 1900, in said action he, the said Jules S. Bache, made personal service on all of the defendants in said action and each of them, of a notice of motion for an order appointing a receiver of all the property which has come into the possession of the Farmers' Loan & Trust Company, under and pursuant to a certain agreement dated June 1st, 1891, and made between the Toledo, St. Louis and Kansas City Railroad Company and Sylvester H. Kneeland and referred to in said petition of Samuel Hunt, to take and hold the same pending said action, subject to the further orders of the supreme court of the State of New York. On the return day of said motion—to wit, the 28th day of May 1900, the Farmers' Loan & Trust Company appeared by its attorneys Messrs. Turner, McClure & Rolston, and Sylvester H. Kneeland appeared by his attorneys, Messrs. Ford & Tuttle, and the Toledo, St. Louis and Kansas City Railroad Company failed to appear. Proof of due service of said notice
104 of motion on said railroad company was made, and thereupon an order was made on said 28th day of May, 1900, by the supreme court of the State of New York, and entered on the same day in the office of the clerk of the county of New York, granting said motion for the appointment of a receiver pending the trial of said action; a copy of said order is hereunto annexed, marked "Exhibit C" and made a part hereof. The Farmers' Loan & Trust Company, being the receiver named in said order, forthwith filed with the clerk of the county of New York its consent to act as such receiver and forthwith and on said 28th day of May, 1900, turned over and delivered to itself as such receiver all the property specified in said order—viz., one hundred and fifty-eight first-mortgage bonds of Toledo, St. Louis and Kansas City Railroad Company of the par value of one thousand dollars each, five thousand shares of the par value of one hundred dollars each of the preferred capital stock of said railroad company, and eleven thousand one hundred and sixty-nine shares of the par value of one hundred dollars each of the common capital stock of said railroad company; and said Farmers' Loan & Trust Company ever since has held and now holds said securities as such receiver subject to the further orders of the supreme court of the State of New York.

Fourth. The above-referred-to bonds and stocks, which said bonds and stocks are also referred to in said petition of Samuel Hunt, receiver, are now and ever since a time long prior to the commencement of the foreclosure suit and general creditors' suit in this court referred to in said petition and either of them, have been in the city

of New York in the State of New York and are not now nor ever have been in the northern district of Ohio or in the State of Ohio or elsewhere within the jurisdiction of this court; and this court has never by any order, decree or process issued in the said suits or otherwise taken possession of them or any of them, or exercised any control over them or any of them or appointed a receiver of them or
105 any of them, nor has the said Samuel Hunt nor any of his predecessors as receiver or receivers in said suits or otherwise taken or had or demanded possession of them or any of them, or exercised or sought to exercise any control over them or any of them, or made any claim or demand for or in respect to them or any of them. The said bonds and stock are not and never have been property or assets of the Toledo, St. Louis & Kansas City Railroad Company.

Fifth. All the acts and proceedings aforesaid were done and taken prior to the making of said petition of said Samuel Hunt, receiver, as well as prior to its filing in the office of the clerk of this court, and also prior to the making or filing or service on anybody of any order requiring a plea or answer to said petition, and prior to the making, entering, filing or service of the writings hereinafter referred to, marked Exhibits "D" and "E."

Sixth. The jurisdiction and power of this court to deal with the bonds and stocks in question, or with any of them, or to determine the conflicting claims and interests therein, or the claim now made by said receiver by said petition, if any he ever had, was not invoked prior to or concurrently with any of the acts or proceedings aforesaid in the said suit now pending in the supreme court of the State of New York, and that the action invoking the jurisdiction of this court, or attempting so to do, for the purpose of determining the claims and rights of the said receiver in or to said bonds and stocks, was not done or taken until after the said supreme court of the State of New York had come into the possession of said bonds and stocks by its receiver as aforesaid, for the purpose of adjudicating the rights, claims and interests of all parties therein.

Seventh. In said action, commenced by him in the supreme court of the State of New York on the 17th day of May, 1900, here-
106 inbefore referred to, the Farmers' Loan & Trust Company and Sylvester H. Kneeland have appeared by their respective attorneys, and the Toledo, St. Louis and Kansas City Railroad Company has failed to appear; neither the Farmers' Loan & Trust Company nor Sylvester H. Kneeland has as yet answered said complaint, or demurred or otherwise pleaded thereto, and said action is now pending and wholly undetermined.

Eighth. He, the said Jules S. Bache, is now, and since a time long prior to the commencement of the general creditors' suit, and of the foreclosure suit in this court referred to in the said petition of Samuel Hunt, receiver, and each of them, has been continuously a citizen of the United States and of the State of New York, and a resident and inhabitant of the city and county of New York in said State of New York, and has never been a citizen, resident or inhabitant of the State of Ohio or domiciled therein.

Ninth. On the 1st day of June, 1900, he received through the United States mail at the said city of New York, and not elsewhere, a writing purporting to be a copy of an order made by Hon. A. C. Thompson, U. S. district judge of the southern district of Ohio, in chambers, at the city of Cleveland, Ohio, a copy of which, marked "Exhibit D," is hereunto annexed and made a part hereof. The said judge had no lawful authority, power or jurisdiction to make said supposed order, and the same is inoperative, null and void. No process has been issued upon said petition or served upon him within the State of Ohio or elsewhere, nor has any notice of the filing of said petition, or of any hearing thereon, or of any proceedings taken or to be taken thereunder or thereon, or requiring him to answer, demur or plead to said petition, been served upon him in the State of Ohio or elsewhere, nor has any order requiring him to answer, demur or plead to said petition, or to appear thereto, in anywise been served upon him in the State of Ohio or elsewhere,
107 nor has he at any time or in anywise appeared to said petition either in person or by agent, attorney, solicitor or counsel, or in anywise or at any time consented to the exercise by this court of jurisdiction of his person or of the subject-matter of said petition, or any part thereof, or in anywise, or at any time, waived or relinquished the objections he now makes to the jurisdiction of this court, or any of them.

Tenth. The Farmers' Loan & Trust Company mentioned in said petition now is, and continuously since a long time prior to the commencement of said general creditors' suit and said foreclosure suit in this court, and each of them, mentioned in said petition, has been, a corporation duly organized and existing under and by virtue of the laws of the State of New York and a citizen of that State, and a resident and inhabitant of the city and county of New York, in said State, and is not now, and never has been, a corporation citizen, resident or inhabitant of the State of Ohio, or domiciled therein.

Eleventh. On the 11th day of June, 1900, the said Farmers' Loan & Trust Company received through the United States mail at the city of New York, and not elsewhere, a writing purporting to be a copy of an order made by Hon. A. J. Ricks, U. S. district judge in chambers, a copy of which, marked "Exhibit E," is hereunto annexed and made a part hereof. The said judge had no lawful authority, power or jurisdiction to make said supposed order, and the same is inoperative, null and void. No process has been issued upon said petition or served upon it within the State of Ohio or elsewhere, nor has any notice of the filing of said petition, or of any hearing thereon, or of any proceeding taken or to be taken thereunder or thereon, or requiring it to plead or answer to said petition, been served upon it in the State of Ohio or elsewhere, nor has any order requiring it to answer, demur or plead to said petition, or to appear thereto in anywise, been served upon it in the State of
108 Ohio or elsewhere, nor has it at any time or in anywise appeared to said petition, either in person or by agent, officer, attorney, solicitor or counsel, or in anywise or at any time consented to the exercise by this court of jurisdiction of its person or of the

subject-matter of said petition, or any part thereof, or in anywise or at any time waived or relinquished the objections he, the said Bache, now makes to the jurisdiction of this court, or any of them.

Twelfth. Sylvester H. Kneeland, mentioned in the petition, is now and since a time long prior to the commencement of the general creditors' suit and of the foreclosure suit in this court, referred to in the said petition of Samuel Hunt, receiver, and each of them, has been continuously a citizen of the United States and of the State of New York, and a resident and inhabitant of the city and county of New York, in said State of New York, and has never been a citizen, resident or inhabitant of the State of Ohio or domiciled therein.

Thirteenth. On the 1st day of June, 1900, he, the said Kneeland, received through the United States mail, at the city of New York and not elsewhere, a writing purporting to be a copy of an order made by Hon. A. C. Thompson, U. S. district judge of the southern district of Ohio, in chambers, at the city of Cleveland, Ohio, a copy of which, marked Exhibit "D," is hereunto annexed and made part hereof. The said judge had no lawful authority, power or jurisdiction to make said supposed order, and the same is inoperative, null and void. No process has been issued upon said petition or served upon him, the said Kneeland, within the State of Ohio or elsewhere, nor has any notice of the filing of said petition or of any hearing thereon, or of any proceeding taken or to be taken thereunder or thereon, or requiring him to answer, demur or plead to said petition, been served upon him, the said Kneeland, in the State of Ohio or elsewhere, nor has any order requiring him, the said
109 Kneeland, to answer or plead to said petition or to appear thereto in anywise been served upon him, the said Kneeland, in the State of Ohio or elsewhere, nor has he, the said Kneeland, at any time or in anywise appeared to said petition, either in person or by agent, attorney, solicitor or counsel, or in anywise or at any time consented to the exercise by the court of jurisdiction of his person or of the subject-matter of said petition, or of any part thereof, or in anywise or at any time, waived or relinquished the objections he, the said Bache, now makes to the jurisdiction of this court, or any of them.

Fourteenth. Morton S. Paton and Richard B. Hartshorne, mentioned in said petition of Samuel Hunt, receiver, and each of them, are now, and since a time long prior to the commencement of the general creditors' suit and of the foreclosure suit in this court referred to in the said petition, have been continuously citizens of the United States and of the State of New York and residents and inhabitants of the city and county of New York in said State of New York, and have never been citizens, residents or inhabitants of the State of Ohio or domiciled therein.

Fifteenth. By reason of the facts aforesaid, said supreme court of the State of New York has exclusive jurisdiction to deal with said bonds and stocks and to determine all conflicting claims of title to the same, or interests therein, including the claim now made by said receiver by said petition.

Wherefore, he, the said Jules S. Bache, prays the judgment of this

court whether he ought to be required to make any other or further answer to the said petition, and prays that said petition be dismissed for want of jurisdiction, with costs in that behalf most wrongfully sustained.

JULES S. BACHE.

SPIEGELBERG & WISE,
Solicitors for Jules S. Bache.

110 UNITED STATES OF AMERICA, }
State of New York, Southern District of New York, } *ss.:*

Jules S. Bache, being duly sworn, deposes and says that he is the same Jules S. Bache named in the foregoing plea, and that such plea is true in point of fact and not interposed for delay.

JULES S. BACHE.

Subscribed and sworn to before me this 26th day of July, 1900.

[SEAL.] J. MANHEIMER,
Notary Public, New York County.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

F. SPIEGELBERG,
Counsel for Jules S. Bache.

111 EXHIBIT A.

New York Supreme Court, County of New York.

JULES S. BACHE, Plaintiff,
against
SYLVESTER H. KNEELAND, THE TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY, and THE FARMERS' LOAN & TRUST COMPANY, Defendants. } Summons.

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated May 17, 1900.

SPIEGELBERG & WISE,
Plaintiff's Attorneys.

Office and post-office address, No. 44 Broad street, borough of Manhattan, city of New York.

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Exhibit B.

New York Supreme Court, County of New York.

Jules S. Bache, Plaintiff,
vs.
Sylvester H. Kneeland, The Toledo, St. Louis & Kansas City Railroad Company, and The Farmers' Loan & Trust Company, Defendants.

The above-named plaintiff, Jules S. Bache, by Spiegelberg & Wise, his attorneys, complains of the defendants and respectfully shows to this court:

First. That the plaintiff herein, heretofore and on the 19th day of July, 1894, in the supreme court of the State of New York in and for the county of New York, recovered a judgment against the defendants Sylvester H. Kneeland and The Toledo, St. Louis and Kansas City Railroad Company for forty-three thousand two hundred and seventy-eight $\frac{64}{100}$ ($43,278.64) dollars in an action wherein this plaintiff was plaintiff and the defendants herein, The Toledo, St. Louis and Kansas City Railroad Company and Sylvester H. Kneeland, were the defendants, and that on the same day—to wit, the 19th day of July, 1894—the said judgment was duly docketed in the office of the clerk of the county of New York.

Second. That on or about the 20th day of July, 1894, an execution upon said judgment was duly issued against the real and personal property of each of the said defendants The Toledo, St.
113 Louis and Kansas City Railroad Company and Sylvester H. Kneeland to the sheriff of the city and county of New York, in which county the defendant Sylvester H. Kneeland then resided and still resides, and the defendant The Toledo, St. Louis and Kansas City Railroad Company then had and still has an office for the regular transaction of business.

Third. That before the commencement of this action the said execution was duly returned by said sheriff wholly unsatisfied, and there is now due the plaintiff on said judgment the sum of forty-three thousand two hundred and seventy-eight $\frac{64}{100}$ ($43,278.64) dollars, with interest from the 19th day of July, 1894.

Fourth. That the plaintiff herein, heretofore and on or about the 19th day of May, 1893, in the supreme court of the State of New York, in and for the county of New York, recovered a judgment against the defendants Sylvester H. Kneeland and The Toledo, St. Louis & Kansas City Railroad Company for seventy-two thousand and five and $\frac{65}{100}$ ($72,005.65) dollars in an action wherein this plaintiff was plaintiff, and the defendants herein, The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, were the defendants, and that on the same day—to wit, the 19th day of May, 1893—said judgment was duly docketed in the office of the clerk of the county of New York.

Fifth. That on or about the 15th day of May, 1900, an execution

upon said last-mentioned judgment was duly issued against the real and personal property of each of the said defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland to the sheriff of the city and county of New York, in which county the defendant Sylvester H. Kneeland then resided and still resides, and the defendant The Toledo, St. Louis & Kansas City Railroad Company then had and still has an office for the regular transaction of business.

Sixth. That before the commencement of this action said
114 last-mentioned execution was duly returned by the said sheriff wholly unsatisfied, and there is now due the plaintiff on said judgment the said sum of seventy-two thousand and five $\frac{65}{100}$ ($72,005.65) dollars, with interest thereon from the 19th day of May, 1893.

Seventh. Plaintiff further alleges, on information and belief, that the defendant The Toledo, St. Louis & Kansas City Railroad Company is a foreign corporation organized under the laws of the State of Ohio, Indiana and Illinois, and that the defendant The Farmers' Loan & Trust Company is a domestic corporation.

Eighth. The plaintiff alleges, on information and belief, that some time during the year of 1886, the exact date the plaintiff being unable to state, the defendant Sylvester H. Kneeland was the owner and holder of, among other property, one hundred and fifty-eight first-mortgage bonds of the Toledo, St. Louis & Kansas City Railroad Company, of the par value of one thousand ($1,000) dollars each, and of eleven thousand (11,000) shares of said company's common capital stock, of the par value of one hundred dollars ($100) each, and of five hundred (500) shares of said company's preferred capital stock of the par value of one hundred dollars ($100) each. That thereafter, and some time during the year of 1886, in pursuance of certain agreements dated January 23rd, 1886, the defendant Sylvester H. Kneeland transferred and delivered, among other property, his said property hereinbefore specified, to one Robert G. Ingersoll and one Isaac W. White, trustees, to hold said property for said defendant Sylvester H. Kneeland pursuant to and under said agreements of January 23rd, 1886.

Ninth. The plaintiff further alleges, on information and belief, that controversies having arisen concerning the terms of said agreements of January 23rd, 1886, and the rights and obligations of the defendant Sylvester H. Kneeland thereunder, the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester
H. Kneeland on or about the first day of June, 1891, entered
115 into an agreement wherein and whereby they arranged and settled said controversies, and wherein and whereby, among other things, they mutually agreed that they would consent and request that said two trustees under said agreements of January 23d, 1886, should deliver certain property hereinafter more particularly specified, which said trustees then held in trust for the defendant Sylvester H. Kneeland as aforesaid, and which formed a portion of the property in the next preceding paragraph of the complaint referred to, to the defendant The Farmers' Loan & Trust

Company upon the execution by the said trust company of a declaration of trust to the effect that it agrees to receive and hold said property in accordance with the trust created by said agreement of June 1st, 1891, and that the said trust company should thereupon hold the same in trust as security for the payment of certain charges and claims against and liens on the line of railroad then operated by the said defendant The Toledo, St. Louis & Kansas City Railroad Company, and upon the further trust to pay over and deliver said property from time to time to the defendant Sylvester H. Kneeland, and upon the payment of said charges, claims and liens.

Tenth. That said property referred to in said agreement, as plaintiff is informed and believes, consisted of one hundred and thirty-two (132) first-mortgage bonds of the Toledo, St. Louis & Kansas City Railroad Company of the par value of one thousand (1,000) dollars each, and of eleven thousand (11,000) shares of its common capital stock of the par value of one hundred ($100) dollars each, and of five hundred (500) shares of its preferred capital stock of the par value of one hundred ($100) dollars each.

Eleventh. Plaintiff further alleges on information and belief that the defendant The Farmers' Loan and Trust Company accepted said trust conferred upon it by said agreement dated June 1st, 1891, and that by an instrument in writing dated June 2d, 1891, said trust company agreed to receive, hold and deliver such securities
116 as might be delivered to it under said agreement in accordance with the terms thereof, and that on payment of the liens and claims contemplated by said agreement of June 1, 1891, it would make deliveries of said securities to the defendant Sylvester H. Kneeland upon the certificate of the president of the defendant The Toledo, St. Louis & Kansas City Railroad Company, and of the defendant Sylvester H. Kneeland, and of the clerk of the circuit court of the United States for the district of Indiana, showing that the claims paid were claims contemplated by said agreement of June 1, 1891.

Twelfth. Plaintiff further alleges, on information and belief, that upon the execution by the defendant The Farmers' Loan & Trust Company of the said instrument in writing dated the 2nd day of June, 1891, the trustees hereinbefore mentioned delivered and transferred the said property above referred to—to wit, one hundred and thirty-two (132) first-mortgage bonds of the defendant The Toledo, St. Louis & Kansas City Railroad Company, and eleven thousand (11,000) shares of its common stock, and five hundred (500) shares of its preferred stock—to the defendant The Farmers' Loan & Trust Company, to be held by it in trust under and pursuant to said agreement of June 1, 1891, and that, as the plaintiff is informed and believes, said securities have ever since been and still are in the possession of the defendant The Farmers' Loan & Trust Company.

Thirteenth. The plaintiff further alleges on information and belief, that there were attached to said one hundred and thirty-two (132) bonds in the next preceding paragraph of this complaint re-

ferred to interest coupons of thirty dollars ($30) each payable on the first day of June and December in each and every year until the maturity of said bonds, but plaintiff is not able to ascertain and, therefore, unable to state whether or not the defendant The Farmers' Loan & Trust Company presented for payment the said coupons when they severally became due prior to the default in the payment thereof as hereinafter stated and whether or not said trust company collected said coupons and now retains the proceeds thereof.

117 Fourteenth. The plaintiff further alleges on information and belief that on or about the 1st day of June, 1891, the said eleven thousand (11,000) shares of the common capital stock of the defendant The Toledo, St. Louis & Kansas City Railroad Company stood on the books of said company in the names of Isaac W. White and Clarence Brown as trustees, and that upon the delivery of said stock to the defendant The Farmers' Loan & Trust Company, as hereinabove referred to, said shares of stock were on the books of the defendant The Toledo, St. Louis & Kansas City Railroad Company, transferred to the defendant The Farmers' Loan & Trust Company and certificates for said stock were issued in the name of the defendant The Farmers' Loan & Trust Company as trustee.

Fifteenth. Plaintiff further alleges on information and belief that thereafter and on or about some time during the latter part of June, 1893, additional twenty-six (26) of the Toledo, St. Louis & Kansas City Railroad Company first-mortgage bonds of the par value of one thousand ($1,000) dollars each, said bonds being a portion of the bonds in the eighth paragraph of said complaint referred to, were delivered and transferred to the defendant The Farmers' Loan & Trust Company to be held in trust by it and to be delivered by it under and pursuant to the terms and conditions of said agreement of June 1, 1891, hereinabove referred to, and that the defendant The Farmers' Loan & Trust Company received said bonds and accepted the same on the same terms and conditions as expressed in said instrument in writing executed by it on June 2nd, 1891, hereinabove referred to, and that said thirty-two (32) first-mortgage bonds have ever since been, and still are, in the possession of the defendant The Farmers' Loan & Trust Company.

Sixteenth. Plaintiff further alleges, on information and belief, that heretofore and on or about the 19th day of June, 1886, the defendant The Toledo, St. Louis & Kansas City Railroad Company executed, acknowledged and delivered to two trustees a cer-

118 tain indenture of mortgage or deed of trust, whereby it conveyed to the said two trustees all its property, more specifically stated in said deed of trust, for the purpose of securing the payment of its first-mortgage bonds to the amount of nine million eight hundred thousand ($9,800,000) dollars, consisting of nine thousand eight hundred (9,800) bonds, by each of which said bonds the defendant The Toledo, St. Louis & Kansas City Railroad Company promised to pay to bearer, or registered owner thereof, on the first day of June, 1916, one thousand dollars ($1,000), with interest

thereon from the first day of June, 1886, at six per centum per annum, payable semi-annually on the first days of June and December of each year. Of the nine million eight hundred thousand dollars ($9,800,000) of bonds so authorized, nine million dollars ($9,000,000) of bonds thereof were issued. Default having been made in the payment of the interest on said bonds due on the first day of June, 1893, such proceedings were had that on the first day of April, 1898, a decree was rendered and filed in the office of the clerk of the circuit court of the United States for the western division of the northern district of Ohio, said court being a court of competent jurisdiction, in an action entitled "Continental Trust Company of the City of New York *v.* The Toledo, St. Louis & Kansas City Railroad Company and others" to which said action the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland were parties wherein and whereby it was, among other things, decreed that the Toledo, St. Louis & Kansas City Railroad Company pay within sixty days after the entry of said decree the amount due on its outstanding first-mortgage bonds and coupons, and that in default of such payment the property subject to such first-mortgage bonds be sold at public auction and that out of the funds arising from said sale there should be paid certain liens and claims, said liens and claims thus ordered to be paid being the same liens and claims hereinabove referred to and contemplated to
119 be paid by said agreement of June 1, 1891. By said decree of April 1, 1898, it was among other things found and decreed that the principal of all said bonds issued by the Toledo, St. Louis and Kansas City Railroad Company was due and payable, and that there was due and owing in respect of said first-mortgage bonds at the date of the entry of the decree the principal thereof—to wit, nine million dollars ($9,000,000)—and the interest thereon, amounting in all to twelve million twenty-eight thousand five hundred ($12,028,500) dollars. That such proceedings were *were* further had in said action, that on November 13th, 1899, a decree was entered and filed in the office of said clerk affirming said decree of April 1, 1898, and that on January 19th, 1900, a further decree was entered in the office of said clerk re-entering said decree of November 13th, 1899.

Seventeenth. Plaintiff further alleges on information and belief that the said liens and claims hereinabove referred to have been and are paid, and have been and are discharged.

Eighteenth. Plaintiff further alleges that the said one hundred and fifty-eight (158) first-mortgage bonds of the Toledo, St. Louis & Kansas City Railroad Company which were delivered and transferred to the defendant The Farmers' Loan & Trust Company in trust, as hereinabove specified, are a portion of the nine thousand (9,000) bonds issued by the Toledo, St. Louis & Kansas City Railroad Company, the principal and interest of which were found and decreed by said decree of April 1st, 1898, to be due and owing.

Nineteenth. Plaintiff further alleges on information and belief that default having been made by the Toledo, St. Louis & Kansas City Railroad Company in payment of the amount found to be due

from it under and pursuant to said decree of April 1, 1898, the property of said railroad company was, pursuant to said decree of April 1, 1898, and said decree of November 13, 1899, affirming said decree of April 1, 1898, and said decree of January 19, 1900, re-entering said decree of November 13, 1899, on or about the 27th day of March, 1900, offered for sale to the highest bidder and
120 sold for twelve million two hundred thousand dollars ($12,200,000), and that said sale was subsequently confirmed.

Twentieth. Plaintiff is informed and believes that, by reason of the facts hereinabove stated, the property transferred to the defendants The Farmers' Loan & Trust Company under and pursuant to the agreement of June 1, 1891, reverts to the defendant Sylvester H. Kneeland, freed and discharged from any obligation on his part to be performed, but that it has become impossible, by reason of the facts hereinbefore referred to, for the defendant The Farmers' Loan & Trust Company to deliver said property to the defendant Sylvester H. Kneeland in accordance with the terms and conditions of said agreement of June 1, 1891, and of the declaration of trust executed by said defendant The Farmers' Loan & Trust Company on June 2, 1891, and the plaintiff further alleges on information and belief that there is danger that the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland will agree to cancel and declare at an end said agreement of June 1st, 1891, and direct the defendant The Farmers' Loan & Trust Company to turn over said property held in trust by it as aforesaid to the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, or either of them, and that said property be removed by reason thereof from the jurisdiction of the court and beyond the reach of the plaintiff and the other creditors of said two defendants or either of them.

Twenty-first. The plaintiff further alleges that if the defendant The Toledo, St. Louis & Kansas City Railroad Company has any right, title or interest, whether legal or equitable, in or to said property held by the defendant The Farmers' Loan & Trust Company as aforesaid, such right, title or interest is subject and inferior to the claim of this plaintiff by reason of his said two judgments hereinabove specified.

Twenty-second. The plaintiff further alleges that the value
121 of the property held by the defendant The Farmers' Loan & Trust Company as aforesaid exceeds the sum of one hundred and eighty thousand dollars ($180,000).

Twenty-third. That said first-mortgage bonds of the Toledo, St. Louis & Kansas City Railroad Company which are in possession of the defendant The Farmers' Loan & Trust Company under and pursuant to the terms and agreement hereinbefore set out are entitled to share in the proceeds of the sale of the property of the Toledo, St. Louis & Kansas City Railroad Company under and pursuant to said decree of April 1, 1898, and the said other decrees hereinbefore mentioned, and that the appointment of a receiver to whom said property shall be turned over by the order of this court is necessary to properly secure the payment of the *pro rata* share of the proceeds of

said sale due on said bonds and coupons, and to retain the proceeds thereof subject to the order of this court, for the benefit of the creditors of said defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, or either of them, and especially for the benefit of this plaintiff.

Twenty-fourth. Plaintiff further alleges on information and belief that the defendant The Farmers' Loan & Trust Company claims a lien on said trust fund held by it as aforesaid for its fees and commissions for the administration thereof.

Twenty-fifth. Plaintiff further alleges that he has not adequate remedy at law, and will be wholly without redress in the premises unless he can reach the said property of the said defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, or either of them, by the aid of a court of equity.

Wherefore, the plaintiff demands judgment:

First. That the agreement of June 1, 1891, specified in this complaint, or so much thereof as created a trust by and under the terms of which the property in this complaint specified was transferred to the defendant The Farmers' Loan & Trust Company, be adjudged to be terminated and at an end.

122 Second. That the right, title or interest, whether legal or equitable, which the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland or either of them, may have in or to the property held by the defendant The Farmers' Loan & Trust Company, as in this complaint specified, shall be adjudged and declared subject to the lien and liens of this plaintiff by reason of the judgments recovered by him against said defendants, as hereinbefore specified.

Third. That the defendant The Farmers' Loan & Trust Company account to this plaintiff for all the property which has come into its possession, as in this complaint specified, and that the defendants be adjudged to apply to the amount of the plaintiff's judgment mentioned and described in this complaint, with interest thereon, said property held as aforesaid by the said defendant The Farmers' Loan & Trust Company.

Fourth. That a receiver of all the said property be appointed, and that the defendants be directed by this court to deliver and transfer to said receiver all of said property, and that for the purpose of such delivery and transfer the defendant The Farmers' Loan & Trust Company duly endorse the certificates of stock standing in its name as trustee as aforesaid, and that the said receiver so appointed having come into possession of all of said property be directed to sell the same and all thereof, or to otherwise dispose of the same under the order of this court, and out of the proceeds thereof to pay to the defendant The Farmers' Loan & Trust Company such compensation as the court may direct for the performance of its trust, and after such payments to pay the costs and disbursements of this action, and after such payments to pay the said judgments mentioned and described in this complaint, with interest thereon, and as to the residue of said proceeds, if any, to hold the same subject to the further order of this court.

Fifth. That the defendant The Farmers' Loan & Trust Company be in the meantime enjoined from paying over and delivering to the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland, or either of them, or to any other person, persons or corporation, and the defendants The Toledo, St. Louis & Kansas City Railroad Company and Sylvester H. Kneeland and each of them be enjoined from demanding of and receiving from said defendant The Farmers' Loan & Trust Company any or all of said property, and that all the defendants be enjoined from in any manner interfering therewith except to preserve the same and to deliver the same to the receiver herein appointed.

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Sixth. For such other or further relief, or both, as may be just and equitable and proper in the premises.

SPIEGELBERG & WISE,
Attorneys for the Plaintiff, 44 *Broad Street*,
Borough of Manhattan, New York City.

STATE OF NEW YORK, }
County of New York, } *ss.:*

Jules S. Bache, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

JULES S. BACHE.

Sworn to before me this 17th day of May, 1900.

Z. ROSENFIELD,
Notary Public (97), *New York County.*

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EXHIBIT C.

At a special term of the supreme court of the State of New York, held at part I thereof, at the county court-house in the borough of Manhattan, city of New York, on the 28th day of May, 1900.

Present: Hon. David Leventritt, justice.

JULES S. BACHE
against
SYLVESTER H. KNEELAND, THE TOLEDO, ST. LOUIS & KANSAS City Railroad Company, and The Farmers' Loan and Trust Company.

A motion having been made in the above-entitled action on the part of the plaintiff for an order appointing a receiver herein of all the property which has come into the possession of the defendant The Farmers' Loan & Trust Company, under and pursuant to a certain agreement dated June 1st, 1891, and made between the

Toledo, St. Louis and Kansas City Railroad Company and Sylvester H. Kneeland, which said agreement and said property are more particularly specified in the complaint herein, to take and hold the same pending this action, subject to the further orders of this court, and said motion having come on to be heard, and the defendants, The Farmers' Loan & Trust Company appearing by its attorneys Messrs. Turner, McClure & Rolston and submitting a memorandum, and the defendant Sylvester H. Kneeland appearing by his attorneys Messrs. Ford & Tuttle, and proof of due service of the
125 summons and complaint and the notice of said motion, together with the papers on which the same was made, having been made by the affidavit of F. Spiegelberg, verified May 28th, 1900.

Now therefore, on reading and filing said notice of motion and the papers on which said motion was made—to wit, the summons and complaint herein, verified the 17th day of May, 1900, and the affidavits of Jules S. Bache and F. Spiegelberg, both of which are verified the 23rd day of May, 1900, and said memorandum of the Farmers' Loan & Trust Company; and after hearing F. Spiegelberg, Esq., of counsel for the plaintiff, in support of said motion, and Messrs. Turner, McClure & Rolston, attorneys for the Farmers' Loan & Trust Company, and Messrs. Ford & Tuttle, attorneys for the defendant Sylvester H. Kneeland, not opposing:

Now, on motion of Spiegelberg & Wise, attorneys for the plaintiff, it is

Ordered that said motion for the appointment of a receiver pending the trial of this action be, and the same hereby is, in all respects granted; and it is further

Ordered that the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, and qualified and authorized to act, be, and the same hereby is appointed receiver during the pendency of this action, of all the property hereinabove referred to, and of all the right, title or interest, whether legal or equitable, which the defendant Sylvester H. Kneeland and the defendant, The Toledo, St. Louis and Kansas City Railroad Company or either of them have or may have in or to said property, said property consisting more particularly of one hundred and fifty-eight (158) first-mortgage bonds of the par value of one thousand dollars (1,000) each of Toledo, St. Louis & Kansas City Railroad Company, together with the semi-annual interest coupons of thirty (830) dollars each thereunto attached, eleven thou-
126 sand six hundred and ninety (11,690) shares of the common capital stock of the par value of one hundred (100) dollars each of said railroad company, and of five thousand (5,000) shares of the preferred capital stock of the par value of one hundred (100) dollars each of said railroad company, together with all other property of whatsoever nature, if any, which the defendant The Farmers' Loan & Trust Company now holds under and pursuant to the terms of said agreement of June 1st, 1891; and it is further

Ordered, that the said receiver hold said property subject to

the further order of this court and have the usual powers appertaining to the office of receiver; and it is further

Ordered, that the defendant The Farmers' Loan & Trust Company forthwith, upon filing its consent to act as receiver as aforesaid, turn over and deliver, or cause to be turned over or delivered, to itself as receiver, all the property hereinbefore specified; and it is further

Ordered, that the said receiver and any party hereto may, at any time, upon proper notice to all the parties who shall or may have appeared in this action, apply to this court for further and other directions and for power to enable the said receiver to properly fulfill its duties.

Enter.

D. L., *J.*

127 EXHIBIT D.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205.	In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.	Cross-bill.	

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

128 This day comes Samuel Hunt, receiver of the Toledo, St. Louis and Kansas City Railroad Company, by Clarence Brown, his solicitor, and presents to the court his intervening petition filed herein on the 28th day of May, 1900, upon consideration whereof, and upon motion of his solicitor it is

Ordered, that the complainant Continental Trust Company of the City of New York, the respondents Toledo, St. Louis and Kansas City Railroad Company and Jules S. Bache, the cross-respondent Sylvester H. Kneeland, and Morton S. Paton and Richard B. Hartshorne, the purchasers of the mortgaged premises demur or plead to said petition or answer the same within twenty days from the date of the entry of this order; and it is further

Ordered that the clerk of this court forthwith mail to said Con-

tinental Trust Company of the City of New York, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, Morton S. Paton and Richard B. Hartshorne, addressed to them at their several offices, certified copies of this order.

Dated May 29th, 1900, at chambers, in the city of Cleveland, O.

A. C. THOMPSON,
U. S. Dist. Judge, Sitting by Designation.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, Western Division, } *ss:*

I, Irvin Belford, clerk of the circuit court of the United States within and for said district and division, do hereby certify that the foregoing is a true and complete copy of the order entered in the therein-entitled cause on May 31st, 1900.

Witness my official signature and the seal of said court, at Toledo, in said district, this 31st day of May, A. D. 1900, and the 124th year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk,*
By J. W. WILSON,
Deputy Clerk.

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EXHIBIT E.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company.

130 This day comes Samuel Hunt, receiver of the Toledo, St. Louis and Kansas City Railroad Company, by Clarence Brown, his solicitor, and presents to the court his intervening petition filed herein on the 28th day of May, 1900, upon consideration whereof and on motion of his solicitor, it is

Ordered that the Farmers' Loan & Trust Company demur, or plead

to said petition, or answer the same with twenty (20) days from the day of the entry of this order; and it is further

Ordered that the clerk of this court forthwith mail to said Farmers' Loan & Trust Company, addressed to it, at its office, a certified copy of this order.

Dated June 9th, 1900, at chambers in the city of Toledo, Ohio.

A. J. RICKS,
United States District Judge.

THE UNITED STATES OF AMERICA, *Northern District of Ohio, Western Division,* } ss:

I, Irvin Belford, clerk of the circuit court of the United States within and for said district and division, do hereby certify that the foregoing is a true and complete copy of the order made in the therein-entitled cause on June 9th, 1900.

Witness my official signature and the seal of said court at Toledo, in said district this 9th day of June A. D. 1900, and the 124th year of the Independence of the United States of America.

[SEAL.]

IRVIN BELFORD, *Clerk,*
By J. W. WILSON,
Deputy Clerk.

(Endorsement:) Filed, July 28, 1900. Irvin Belford, clerk.

131 United States Circuit Court, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant, *vs.* TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY, Joseph S. Stout, Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache, Oliver & Roberts Wire Co., George B. Cass, Oliver Adams, Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin, and Ellen V. Hamlin, Respondents.	No. 1205.
CHARLES HAMLIN, HANNIBAL E. HAMLIN, FRANK HAMLIN, and Ellen V. Hamlin, Complainants, *vs.* CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.

Petition of Samuel Hunt, Receiver.

Plea of Jules S. Bache denying the jurisdiction of the court.

The facts shown by the record in this suit necessary to be considered, upon this hearing, may be summarised as follows:

The line of railroad involved in this litigation was, prior to the

30″ day of December, 1885, owned by the Toledo, Cincinnati & St. Louis Railroad Company, and was afterwards owned by the Toledo, St. Louis and Kansas City Railroad Company and is now owned by the Toledo, St. Louis & Western Railroad Company. On the 30″ day of December, 1885, under a decree of foreclosure, it was sold, as the property of the Toledo, Cincinnati & St. Louis Railroad Company to Sylvester H. Kneeland, who purchased it, as the representative of the reorganization committees of certain bondholders. The Toledo, St. Louis and Kansas City Railroad Company, was thereupon organized and the railroad was conveyed to it by Kneeland, who agreed to pay and discharge certain so-called underlying liens thereon, for the payment of which the court, under whose decree the road was sold, reserved the power to retake and re-
132 sell the road. In consideration of the conveyance of the road and the agreement of Kneeland to make certain improvements thereon, the Toledo, St. Louis and Kansas City Railroad Company, agreed to issue and deliver to Kneeland its capital stock and 9000 first-mortgage bonds of the par value of $1000 each, reserving therefrom however 158 of said bonds, which, together with other securities were deposited with the Farmers' Loan and Trust Company of New York, to secure the payment of said underlying liens, said bonds to be delivered by said trust company to Kneeland from time to time as said liens were paid and discharged.

Afterwards the Toledo, St. Louis and Kansas City railroad became insolvent, and the railroad and the property connected therewith were, by an order of this court, in this suit, placed in the hands of a receiver, and Kneeland having failed to pay and discharge said underlying liens, the receiver, for the protection of the property, acting under the direction of this court, paid and discharged said liens, out of the moneys and property of the railroad company in his hands, the amount so paid being over $500,000.

Afterwards on the 27″ day of March, 1900, said railroad and property were sold and, on the 17″ day of April, 1900, it appearing that the purchasers had made the cash payment required by the court and had deposited with the complainant first-mortgage bonds of the Toledo, St. Louis and Kansas City Railroad Company to the amount, at par, of $8,814,000, the sale was confirmed and a deed was ordered to be made conveying said railroad and property to the purchasers or to their assigns, and the distribution of the proceeds of the sale was reserved for future order.

Afterwards, on the — day of —— 18—, it appearing to the court that the purchasers had assigned their rights to the Toledo, St. Louis & Western Railroad Company, and that, in compliance, with the order of court, deeds had been made conveying said railroad and property to that company, as the assignee of the purchasers, the receiver was ordered to deliver possession thereof to said Toledo, St. Louis & Western Railroad Company, on the first day of August, 1900, and said company was made a party to this suit, as the successor in right and obligation, to Morton S. Paton and Richard B. Hartshorne, purchasers and James N. Wallace as their assignee, and, as such party, to be bound by all the proceedings taken herein since

the 17″ day of April, 1900, including the order of confirma-
133 tion of sale, and, in compliance with the order of the court, said railroad and the property in the possession of the receiver were delivered to the Toledo, St. Louis & Western Railroad Company, at the time fixed, and the receiver was afterwards discharged.

On the 27″ day of May, 1900, Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed his petition in this suit, setting up the facts hereinbefore recited, and claiming that he "is entitled, out of said first-mortgage bonds and said preferred stock and said common stock, in the hands of said Farmers' Loan & Trust Company, to be reimbursed all said amounts, with interest thereon, from the respective dates of payment thereof, which by him and by his predecessors in the receivership in this cause, of the said Toledo, St. Louis and Kansas City Railroad Company, have been paid in respect of said prior claims, whether for principal or interest," and praying "that said securities, towards satisfaction thereof, be delivered to the petitioner, to be by him delivered, as part of the mortgaged premises to the purchasers of the mortgaged premises at said sale thereof, made under said decrees of foreclosure of said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, or that said securities be sold and the proceeds thereof paid to your petitioner, for payment by him to said purchasers of the mortgaged premises, or be paid to said purchasers, and for such other and further relief as may be just."

On the 28″ day of July, 1900, Jules S. Bache, filed a plea to the jurisdiction of the court of his person and of the subject-matter of the petition of Samuel Hunt, receiver, in which he alleges, in substance, that he is the owner of certain judgments against Kneeland and the Toledo, St. Louis and Kansas City Railroad Company, and that, on the 17″ day of May, 1900, he commenced a proceeding, in aid of execution, in the supreme court of the State of New York, in the county of New York, against Kneeland and the Toledo, St. Louis and Kansas City Railroad and the Farmers' Loan & Trust Company, for the purpose of appropriating to the payment of these judgments, the mortgage bonds and other securities deposited with and held, as hereinbefore stated by the Farmers' Loan & Trust Company, to secure the payment of the so-called underlying liens, and that, in said proceeding, the Farmers' Loan &
134 Trust Company was appointed a receiver to hold said mortgage bonds and other securities subject to the order of said court.

Bache, as a junior encumbrancer of the railroad and property of the Toledo, St. Louis and Kansas City Railroad Company, was made one of the original defendants in this suit, and entered his appearance herein, on the 24″ day of January, 1894, and afterwards set up his claim, by answer, in the foreclosure suit, and also proved it before the master, in the creditors' suit, which is the same claim, upon which his proceeding, in the State court is founded. Kneeland is also a party to the cause. And, as persons having an interest in the

bonds, in question, they are represented by the Continental Trust Company, as trustee of the mortgage in suit.

First. Has the court jurisdiction of the subject-matter of this proceeding?

When the receiver used the moneys of the receivership to discharge the underlying liens, an equitable right accrued to him and to those whom he represented, to be reimbursed out of the bonds deposited with the Farmers' Loan & Trust Company, and that right became a part of the mortgaged property and passed by the sale to the purchaser, and is now vested in the Toledo, St. Louis & Western Railroad Company. This right or equity is covered by the fourth paragraph of the decree of foreclosure which describes the property found by the court to be subject to the lien of the mortgage. The proceeds of the sale of the mortgaged property have not been distributed but are still under the control of the court. The distribution thereof was expressly "reserved for future order" by the decree confirming the sale, and no order of distribution has since been made and this court has exclusive jurisdiction to determine when, how, and to whom the distribution shall be made, and, in ordering distribution may, if all the parties, in interest, are before the court, enforce the receiver's right of reimbursement by setting apart for that purpose, the distributive share of the proceeds of the sale, to which the bonds, in question, may be entitled. This will restore, in part, the moneys of the receivership used to discharge the underlying liens, and will effect a delivery to the Toledo, St. Louis & Western Railroad Company of a part of the property which passed to it by the sale, and will not involve a conflict of jurisdiction between this court and the State court. The trust, with which the
135 bonds in the possession of the Farmers' Loan & Trust Company is charged, appears from the petition filed by Bache in the State court, and while that court may sell the bonds and apply the proceeds to the payment of Bache's claim, yet the purchaser will take the bonds subject to the trust, under which the receiver's equity is asserted.

Second. Has the court, for the purposes of this proceeding, jurisdiction of the person of Jules S. Bache?

The Toledo, St. Louis and Kansas City Railroad Company, the Toledo, St. Louis & Western Railroad Company, the Continental Trust Company, as trustee of the mortgage securing the bonds, Sylvester H. Kneeland, Jules S. Bache, the Farmers' Loan & Trust Company and the receiver, are the only parties who have any interest, whatever, in the bonds. These parties are all before the court except the Farmers' Loan & Trust Company, and it is not a necessary party. The Toledo, St. Louis and Kansas City Railroad Company, the Continental Trust Company and Jules S. Bache were original parties to the suit. As a junior encumbrancer, Bache has never been dismissed from the suit, and as such he is before the court, for all the purposes of the distribution, of the proceeds of the sale of the mortgaged property. The bonds in question have little or no value other than such as accrues, from the right to participate, in the distribution, of the proceeds, of the sale, of the mortgaged

property, and the proceeding, in the State court was instituted by Bache, manifestly for the purpose of obtaining that right, and if it could be so obtained, undoubtedly, Bache, as party to this suit, could invoke any action of this court necessary to obtain the payment of their distributive share to him. The fund is here, the parties in interest are here and are entitled to have the fund distributed, according to their respective rights and priorities, whether their rights existed at the commencement of the suit or have been since acquired.

Pending the delivery of the mortgaged property to the purchaser, which the receiver was required to make, under the order of the court confirming the sale, it was competent for the receiver to seek the aid of the court to recover the moneys of the receivership used in discharging the underlying liens, with a view to their transfer to the purchaser or such other disposition thereof as the
136 court might see fit to make.

The plea will be overruled.

(Endorsement:) No. 1205. United States circuit court, northern district of Ohio, western division. Continental Trust Co. of the City of New York, &c. *vs.* Toledo, St. Louis and Kansas City Railroad Company, *et al.* Charles Hamlin, *et al.*, *vs.* Continental Trust Co. of the City of New York, *et al.* Opinion of Judge Thompson. Filed, Dec. 4, 1901, Irvin Belford, clerk.

137 December Term, A. D. 1901, to wit, December 14, 1901.

Present: The Honorable Francis J. Wing, U. S. district judge.

CONTINENTAL TRUST COMPANY OF NEW YORK ET AL.
vs.
TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD CO. ET AL.

In the matter of the intervening petition of Samuel Hunt against Jules S. Bache and others.

This cause came on to be further heard upon the plea of Jules S. Bache to the jurisdiction of the court of his person and of the subject-matter on the petition of Samuel Hunt, receiver, and was submitted to the court. And the court, having heard the arguments of counsel and being now fully advised in the premises, finds that said plea is not well taken.

It is therefore, ordered, adjudged and decreed that the said plea of the said Jules S. Bache be, and the same hereby is, overruled; to which order the said Bache duly excepted.

138 (Entered) Saturday, December 21, 1901.

CONTINENTAL TRUST COMPANY OF THE City of New York, Survivor of John M. Butler,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*
No. 1205. In Equity.

CHARLES HAMLIN ET AL.
against
CONTINENTAL TRUST COMPANY OF THE City of New York, Toledo, St. Louis and Kansas City Railroad Company.
Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, against Continental Trust Company, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis & Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan and Trust Company, *et al.*

It appearing to the court that certified copies of the order of court issued upon the petition of Samuel Hunt, receiver, verified and filed on the twenty-eighth day of May, 1900, were duly served on the Continental Trust Company, Richard B. Hartshorne, Morton S. Paton, the Toledo, St. Louis and Kansas City Railroad Company, Jules S. Bache and Sylvester H. Kneeland, on the thirty-first day of May, 1900, and on the Farmers' Loan and Trust Company, on the ninth day of June, 1900, in the manner provided by said order, and, it further appearing to the court that it was subsequently ordered that said petition be dismissed as to the said Richard S. Hartshorne and Morton S. Paton, and that James N. Wallace be made a party to this cause and be bound by all proceedings taken herein since the seventeenth day of April, 1900; and, it further appearing to the court that the said Toledo, St. Louis & Kansas City Railroad Company, Sylvester H. Kneeland and the Farmers' Loan and Trust Company have not appeared, answered or pleaded to said petition, and more than one year having elapsed since the service of said orders and the said James N. Wallace being in default for answer or plea herein, it is now ordered that the said petition be taken as confessed as against all the persons aforesaid with the exception of the Continental Trust Company Jules S. Bache, Richard B. Hartshorne and Morton S. Paton.

139 In the Circuit Court of the United States, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY ET AL., Defendants.

CHARLES HAMLIN ET AL., Cross-complainant-,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-defendants.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

GENTLEMEN: Please take notice that the undersigned will make an application before Hon. Francis J. Wing, United States district judge at his chambers in the city of Cleveland, Ohio, on the 2nd day of January, 1902, at 10 o'clock a. m., for an order granting leave to Jules S. Bache to answer the petition of Samuel Hunt, receiver, on or before the 6th day of January, 1902.

Dated December 31, 1901.

Yours, &c., SPIEGELBERG & WISE,
Solicitors for Jules S. Bache, Appearing Specially for the Purpose of the Plea to the Petition.

To Messrs. Butler, Notman, Joline & Mynderse, solicitors for receiver.

140 (Endorsement:) 1205. U. S. district court northern dist. of Ohio, western div. Continental Trust Company, complainant, against Toledo, St. Louis & Kansas City Railroad Company, *et al.* defendants. In the matter of the petition of Samuel Hunt. Notice of application. Spiegelberg & Wise, solicitors for Jules S. Bache (Edison building) 44 Broad street New York. Jan. 4, 1902, Leave granted. Wing J. Due service of a copy of within notice is admitted this 31st day of December, 1901. Butler, Notman, Joline & Mynderse, solicitors for rec'v'r. Filed. Jan. 6, 1902. Irvin Belford, clerk.

141 (Entered) Monday, April 7, 1902.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.* } No. 1205. In Equity.

CHARLES HAMLIN ET AL.
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, against Continental Trust Company, Richard B. Hartshorne, Morton S. Patton, Toledo, St. Louis & Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan and Trust Company, *et al.*, respondents.

It appearing to the court that the plea of Jules S. Bache to the jurisdiction of the court of his person and of the subject-matter of the petition of Samuel Hunt, receiver, was by the court on the 14th day of December, 1901, overruled and that said Jules S. Bache has not answered, or otherwise pleaded, to said petition and more than three months having elapsed since the overruling of said plea, and the said Jules S. Bache being in default for answer or further plea herein, it is now ordered that the said petition be taken as confessed against him, the said Jules S. Bache.

142 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY ET AL., Respondents.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

You will please to take notice that the plea of Jules S. Bache to the petition of said Samuel Hunt, receiver, filed herein, has been

set for hearing before the Honorable A. C. Thompson, judge of the United States district court for the southern district of Ohio, for November 24, 1900, at nine o'clock a. m., at the United States court-rooms, in the city of Cincinnati, Ohio.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Solicitors for Purchasers.

To Messrs. Spiegelberg & Wise, solicitors for Jules S. Bache, 44 Broad St., New York city.

(Endorsement:) #1205. U. S. circuit court, no. dist. of Ohio, W. div. Continental Trust Co., of the City of N. Y., survivor, &c., against Toledo, St. Louis & Kansas City R. R. Co., *et al.* (and another case) In matter of petition of Sam'l Hunt, as receiver &c. Notice of hearing of plea. Butler, Notman, Joline & Mynderse, sol'rs for purchasers, 54 Wall street, New York city. Received, Nov. 20, 1900, Spiegelberg & Wise. Filed, Sep. 12, 1902, Irvin Belford, clerk.

143 December Term, A. D. 1902, to wit, December 4, 1902.

Present: The Honorable Francis J. Wing, U. S. district judge.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.* } No. 1205. In Equity.

CHARLES HAMLIN ET AL.
vs.
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, *vs.* Continental Trust Company, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan and Trust Company, *et al.*

This cause came on to be heard at this term upon the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, the answer of the respondent, The Continental Trust Company of the City of New York, and the proofs in the case.

And it appearing that the said petition of Samuel Hunt, receiver, was filed in this court on the 28th day of May, 1900, and that on the 9th day of June, an order was made and duly served upon the respondents, The Continental Trust Company, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis and Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland, and The Farmers' Loan & Trust Company; requiring them and each of them to de-

mur or plead to or answer said petition within 20 days from the date of said order.

And it further appearing that it was subsequently ordered herein that said petition be dismissed as to said Richard B. Hartshorne and Morton S. Paton, and that James N. Wallace be made a party to this cause and be bound by all proceedings taken herein since the 17th day of April, 1900;

144 And it further appearing that, by an order made and entered herein on the 28th day of July, 1900, The Toledo, St. Louis & Western Railroad Company was substituted as petitioner herein in place of the said Samuel Hunt, receiver as aforesaid, as purchaser of the line of railroad, rights, privileges and franchises of the Toledo, St. Louis and Kansas City Railroad Company at the foreclosure sale thereof, and as successor in right to the said Samuel Hunt as such receiver and the Toledo, St. Louis and Kansas City Railroad Company;

And it further appearing that no appearance has been entered and no demurrer, plea or answer filed by the respondents James N. Wallace, The Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland and The Farmers' Loan & Trust Company, and that an order taking the said petition *pro confesso* against the said respondents was duly made and entered herein on the 21st day of December, 1901, and that no proceedings have been had or taken by the said respondents since said order was entered, and that more than thirty days have elapsed since the entering of said order;

And it further appearing that the said respondent Jules S. Bache, having filed his plea to the jurisdiction herein, and appearing for said purpose only, which said plea was thereafter overruled, did not answer or otherwise plead to the said petition, and that on the 7th day of April, 1902, an order was duly entered herein, taking the said petition *pro confesso* against the said respondent and that no proceedings have been had or taken by the said respondent since said order was entered, and that more than thirty days have elapsed since the entering of said order taking said bill *pro confesso* against said respondent Jules S. Bache;

And it further appearing that on the 27th day of July, 1900, the respondent The Continental Trust Company of the City of New York filed its answer herein, confessing the allegations of the said petition and submitting its rights in the premises to the court and praying such decree as to the court should seem just;

And it appearing that the respondent The Farmers' Loan & Trust Company, in pursuance of a certain agreement and declara-
145 tion of trust in said petition set forth holds the following securities, which said securities were delivered to it under the said agreement and declaration of trust, for the purpose of securing the payment of certain outstanding claims against the assets and property of the Toledo, St. Louis & Kansas City Railroad Company, including the claims of the American Surety Company, the Northern National Bank of Toledo, Ohio, and others whose claims were represented by said bank and the State Trust Company of New York, to wit:

First-mortgage bond of the Toledo, St. Louis and Kansas City Railroad Company of the par value of one hundred and fifty-eight thousand dollars ($158,000), bearing the coupon maturing June 1, 1893, and all subsequent coupons.

Preferred stock of the said Toledo, St. Louis and Kansas City Railroad Company to the par value of five hundred thousand dollars ($500,000).

Common stock of the said Toledo, St. Louis and Kansas City Railroad Company to the par value of one million, one hundred and sixty-nine thousand dollars ($1,169,000).

And it further appearing that said claims remained unpaid in violation of the aforesaid agreements, and that Samuel Hunt, as receiver as aforesaid, and his predecessors in office, thereafter, and during the pendency of their respective receiverships, paid and expended the sum of $555,759.42 in full satisfaction of the claims of the American Surety Company of New York, the Northern National Bank of Toledo, Ohio, and the State Trust Company, of New York, and interest thereon, as more particularly in said petition set forth; said claims being paid in part out of moneys arising from the operation of the said Toledo, St. Louis and Kansas City railroad during the period of the said receiverships; and in part by the issue of four hundred and thirty thousand dollars ($430,000) receiver's certificates as in said petition set forth.

And it further appearing that the said receiver, and his predecessors in office, under orders of this court herein duly made and entered further paid interest upon the said claim of the said Northern National Bank, of Toledo, Ohio, and others whose claims were represented by said bank, and upon the said claim of the said The State Trust Company of New York, quarterly, from July 1st, 1894 to June 1, 1898, at the rate of six per cent. (6%) per annum.

146 And it further appearing that the said receiver's certificates so issued as aforesaid, have been fully paid, partly out of the monies in the said receiver's hands arising out of the operation of the said railroad, and partly out of the proceeds of the sale of the property of the said Toledo, St. Louis and Kansas City Railroad Company, heretofore made herein;

And it further appearing that the amount of the aforesaid claims, paid by the said receivers, is largely in excess of the actual value of the said securities, the value of the said first-mortgage bonds, with accrued interest, being not in excess of the sum of $1,350 each and the said preferred and common stock having no market or actual value;

Now, therefore, upon consideration of the said petition, the answer thereto of the respondent, The Continental Trust Company of the City of New York, and the said proofs, and by reason of the default of the said respondents James N. Wallace, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan & Trust Company and Jules S. Bache,

It is, by the court, ordered, adjudged, and decreed as follows:

That the prayer of the said petition be granted, and that the said Toledo, St. Louis and Western Railroad Company, as successor to

the rights of the said Samuel Hunt, as such receiver, and his predecessors in office, is entitled out of the first-mortgage bonds and the said preferred stock and the said common stock in the hands of the respondent The Farmers' Loan & Trust Company, to be reimbursed, all said amounts, with interest thereon from the respective dates of payment thereof, which, by the said Samuel Hunt, as such receiver, and by his predecessors in the receivership in this cause of the said Toledo, St. Louis and Kansas City Railroad Company, have been paid in respect of the said prior claims, whether for principal or interest; that said securities be delivered to the said Toledo, St. Louis and Western Railroad Company, and that in default of such delivery within thirty days from the entry of this order, the said securities shall stand cancelled and as of no further force or effect as obligations of the said Toledo, St. Louis and Kansas City Railroad Company.

147 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.
No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.
Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, A. D. 1900.

To the Honorable Francis J. Wing, United States district judge, and one of the judges of the above-named court, presiding therein:

Your petitioner, Jules S. Bache, considering himself aggrieved by the decree of this court this day, viz: the 4th day of December, 1902, entered on the above-mentioned petition, ordering, adjudging and decreeing

"That the prayer of the said petition be granted, and that the "said Toledo, St. Louis and Western Railroad Company, as successor "to the rights of the said Samuel Hunt, as such receiver, and his "predecessors in office, is entitled out of the said first-mortgage "bonds and the said preferred stock and the said common stock in

"the hands of the respondent The Farmers' Loan and Trust Com-
"pany, be reimbursed all said amounts with interest thereon from
"the respective dates of payment thereof, which by the said Samuel
"Hunt as such receiver, and by his predecessors in the receivership
"in this cause of the said Toledo, St. Louis and Kansas City Rail-
"road Company have been paid in respect of the said prior claims,
"whether for principal or interest; that said securities be delivered
"to the said Toledo, St. Louis and Western Railroad Company, and
"that in default of such delivery within thirty days from the
148 "entry of this decree, the said securities shall stand cancelled
"and as of no further force or effect as obligations of the said
"Toledo, St. Louis and Kansas City Railroad Company,"

and by the following interlocutory orders entered upon said petition, viz: Order filed May 31st, 1900, ordering Continental Trust Company of the City of New York and others to answer, demur or plead to said petition; order filed June 9th, 1900, ordering the Farmers' Loan & Trust Company to answer, demur or plead to said petition; order filed July 28th, 1900, substituting Toledo, St. Louis and Western Railroad Company as petitioner in said petition in the place of Samuel Hunt, as receiver; order filed December 14th, 1901, overruling the plea of Jules S. Bache to said petition; order filed April 7th, 1902, ordering that said petition be taken as confessed against Jules S. Bache, does hereby appeal from such decree and orders, and each of them, to the Supreme Court of the United States, for the reasons specified in the assignment of errors hereto annexed, and he prays that this his appeal be allowed on the ground that the jurisdiction of the court is in issue, and that this court certify the question of jurisdiction to the said Supreme Court for its decision, and that a transcript of the record and proceedings and papers upon which said decree and orders were made, so far as they appertain to the said questions of jurisdiction, duly authenticated may be sent to the Supreme Court of the United States.

And petitioner further prays that the court fix the penalty of a cost bond to be given by this petitioner within thirty days from the allowance of the appeal prayed for herein, and petitioner herewith submits and files his assignment of errors as required by the rules and practice in such cases.

SPIEGELBERG & WISE,
Solicitors for Petitioner.

(Endorsement:) United States circuit court, northern district of Ohio, western division. # 1205. Continental Trust Company against Toledo, St. Louis & Kansas City Railroad Co., *et al.* In the matter of the petition of Samuel Hunt, as receiver, &c. Petition for allowance of appeal and certificate. Spiegelberg & Wise, solicitors for J. S. Bache. Filed, Dec. 4, 1902, Irvin Belford, clerk.

149 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS & KANSAS CITY RAILroad Company *et al.*, Respondents.
} No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.
} Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

Assignment of Errors of Appellant Jules S. Bache.

And now, on this 4th day of December, 1902, being one of the days of the December term, 1902, of this court, comes Jules S. Bache, by Spiegelberg & Wise, his solicitors, and says that the decree of the circuit court in the above-entitled proceeding entered on this day upon the petition above referred to adjudging and decreeing

"that the prayer of said petition be granted, and that the said "Toledo, St. Louis and Western Railroad Company, as successor to "the rights of the said Samuel Hunt, as such receiver, and his prede- "cessors in office, is entitled out of the said first-mortgage bonds "and the said preferred stock and the said common stock in the "hands of the respondent, The Farmers' Loan and Trust Company, "to be reimbursed all said amounts with interest thereon from the "dates of payment thereof which by the said Samuel Hunt as such "receiver, and by his predecessors in the receivership in this cause "of the said Toledo, St. Louis & Kansas City Railroad Company "have been paid in respect of the said prior claims, whether for "principal or interest; that said securities be delivered to the said "Toledo, St. Louis and Western Railroad Company, and that in de-
"fault of such delivery within thirty days from the entry of
150 "this order, the said securities shall stand cancelled and as of
"no further force or effect as obligations of the said Toledo, "St. Louis and Kansas City Railroad Company,"

and each of the several interlocutory orders entered upon said petition, to wit: Order filed May 31st, 1900, ordering Continental Trust Company of the City of New York and others to answer, demur or plead to said petition; order filed June 9th, 1900, ordering the Farmers' Loan and Trust Company to answer, demur or plead to

said petition; order filed July 28th, 1900, substituting Toledo, St. Louis & Western Railroad Company as petitioner in said petition in the place of Samuel Hunt as receiver; order filed December 14th, 1901, overruling the plea of Jules S. Bache to said petition; order filed April 7th, 1902, ordering that said petition be taken as confessed against Jules S. Bache, is each erroneous, without the power or jurisdiction of said circuit court, and against his just rights, for the following reasons:

1. The said circuit court erred in overruling the plea of appellant, Jules S. Bache, to the jurisdiction in the proceedings upon said petition filed in the office of the clerk of said court on the 28th day of July, A. D. 1900.

2. The said circuit court had no jurisdiction of the subject-matter of said petition, for that the bonds coupons and stock therein referred to were never within or subject to its jurisdiction.

3. The circuit court had no jurisdiction of the subject-matter of said petition, for that said bonds, coupons and stock were in the possession and control of the supreme court of the State of New York, by its receiver duly appointed and qualified in the proceedings referred to in the plea of appellant Bache, at the time of and prior to the filing of said petition in the office of the clerk of the said circuit court or the taking of any proceedings thereon by said circuit court.

4. The circuit court erred in adjudging that the consolidated suit referred to in said petition was still pending, and that by reason thereof it had ancillary or dependent jurisdiction of the subject-matter of said petition, and in not holding that the entry of a final decree in such consolidated suit divested the court of ancillary or dependent jurisdiction for the purposes of said petition.

151 5. The circuit court erred in adjudging that, as the Continental Trust Company of New York, as trustee of the mortgage securing the nine thousand (9,000) bonds of which the one hundred and fifty-eight (158) bonds and coupons in question were a part, represented and was trustee of the holders of all such bonds, in consequence thereof represented appellant Bache in respect of his lien, rights and interest in said one hundred and fifty-eight (158) bonds, coupons and stock derived from the proceedings instituted by him in the supreme court of the State of New York, referred to in his said plea, that therefore the court had jurisdiction of the subject-matter of said petition and power to adjudicate as between the conflicting claims of appellant Bache on the one hand and receiver Hunt or the said Toledo, St. Louis and Western Railroad Company on the other in respect of said one hundred and fifty-eight (158) bonds, coupons and stock.

6. The circuit court was without jurisdiction to grant the relief prayed in said petition, or any relief, because it appears therefrom, and from said plea of appellant Bache, that none of said one hundred and fifty-eight (158) bonds or coupons, or five thousand shares (5,000) of preferred stock and eleven thousand, one hundred and sixty-nine (11,169) shares of common stock, were ever in the possession of said receiver Hunt, or any of his predecessor receivers, and that any

right of either of such receivers to the possession or ownership thereof if any there ever was, had passed to the purchasers at the sale under the foreclosure decree prior to the filing of said petition or the taking by the court of any proceedings thereon.

7. The circuit court erred in adjudging that it had jurisdiction, under said petition, to determine as between the conflicting claims of appellant Jules S. Bache, on the one hand, and said Samuel Hunt, receiver, or the Toledo, St. Louis and Western Railroad Company on the other, to the one hundred and fifty-eight (158) bonds and coupons, five thousand (5,000) shares of preferred stock, and eleven thousand, six hundred and ninety (11,690) shares of common stock of the Toledo, St. Louis and Kansas City Railroad Company referred to in said petition, and in decreeing the delivery of the same to said Toledo, St. Louis and Western Railroad Company, or in default thereof that the same stand cancelled and as of no further
152 force or effect as obligations of the said Toledo, St. Louis and Kansas City Railroad Company, and that the rights, interests and liens of appellant, Jules S. Bache, thereto, acquired through the proceedings in the supreme court of the State of New York, referred to in said plea, are junior, subject and subordinate to those thus decreed to said Toledo, St. Louis and Western Railroad Company or that he acquired no right, lien or interest in such bonds, coupons and stock by said proceedings.

8. The circuit court had no jurisdiction of the person of appellant, Jules S. Bache, for that he at no time was within or subject to the jurisdiction of said circuit court; that no process had been issued upon said petition or served upon him within the State of Ohio, or elsewhere; nor had any notice of the filing of said petition, or of any hearing thereon, or of any proceeding taken or to be taken thereunder or thereon, or requiring him to answer demur or plead to said petition, been served upon him in the State of Ohio, or elsewhere; nor had any order requiring him to answer demur or plead to said petition, or to appear thereto, in anywise been served upon him in the State of Ohio, or elsewhere; nor had he at any time, or in anywise, appeared to said petition, either in person or by agent, attorney, solicitor, of counsel, or in anywise, or at any time, consented to the exercise by said court of jurisdiction of his person, or at any time waived or relinquished the objections made by him to the jurisdiction of said court, by his plea to such jurisdiction, or any of them.

9. The said court had no jurisdiction of the person of appellant, Jules S. Bache for that the alleged service by mail by the clerk of the alleged order dated May 29th, 1900 and filed May 31st, 1900, requiring him to demur or plead to said petition or answer the same within twenty days from the date of the entry of such order, was not authorized by any order of said court or any judge thereof and for that the judge making said order had no lawful authority, power or jurisdiction to do so and the same is inoperative, null and void.

10. The circuit court erred in adjudging that appellant Bache was a party to the consolidated suit referred to in said petition, and that

by reason thereof jurisdiction of his person for the purpose
153 of said petition was obtainable by the making of an alleged service by mail of the order of May 29th, 1900, and in not holding that if he was such party, that the entry of the final decree in such consolidated suit divested the court of ancillary or dependent jurisdiction of his person for the purposes of said petition.

11. The circuit court erred in adjudging that, as the Continental Trust Company of New York, as trustee of the mortgage securing the nine thousand (9,000) bonds of which the one hundred and fifty-eight (158) bonds in question were a part, represented and was trustee of the holders of all such bonds, in consequence thereof represented appellant Bache in respect of his lien, rights and interest in said one hundred and fifty-eight (158) bonds, coupons and stock derived from the proceedings instituted by him in the supreme court of New York referred to in his said plea, that therefore the court had jurisdiction of his person by representation of such Continental Trust Company for the purposes of said petition.

12. The circuit court had no jurisdiction of the person of Sylvester H. Kneeland, for that he at no time was within or subject to the jurisdiction of said circuit court: that no process had been issued upon said petition or served upon him within the State of Ohio, or elsewhere; nor had any notice of the filing of said petition, or of any hearing thereon, or of any proceeding taken, or to be taken, thereunder, or thereon, or requiring him to answer, demur, or plead to said petition, been served upon him in the State of Ohio or elsewhere; nor had any order requiring him to answer demur or plead to said petition, or to appear thereto, in anywise been served upon him in the State of Ohio, or elsewhere; nor had he at any time, or in anywise, appeared to said petition, either in person or by agent, attorney, solicitor or counsel, or in anywise or at any time consented to the exercise by said court of jurisdiction of his person, or at any time waived or relinquished any of said objections to the jurisdiction of the court.

13. The circuit court erred in adjudging that Sylvester H. Kneeland was a party to the consolidated suit referred to in said petition, and that by reason thereof jurisdiction of his person for the purposes of said petition was obtainable by the making
154 and alleged service by mail of the order of May 29th, 1900, and in not holding that if he was such party, that the entry of the final decree in such consolidated suit prevented the exercise of ancillary or dependent jurisdiction of his person for the purposes of said petition.

14. The circuit court had no jurisdiction of the person of the Farmers' Loan and Trust Company, for that it at no time was within or subject to the jurisdiction of said court; that no process had been issued upon said petition, or served upon it within the State of Ohio, or elsewhere; nor had any notice of the filing of said petition, or of any hearing thereon, or of any proceeding taken, or to be taken, thereunder or thereon, or requiring it to answer, demur or plead to said petition, been served upon it in the State of Ohio, or elsewhere; nor had any order requiring it to answer, demur or

plead to said petition, or to appear thereto in anywise been served upon it in the State of Ohio, or elsewhere; nor had it at any time, or in anywise, appeared to said petition, either in person or by agent, attorney, solicitor or counsel, or in anywise or at any time consented to the exercise by said court of jurisdiction of its person, or at any time waived or relinquished any of the different objections to the jurisdiction of said court of its person.

15. The circuit court erred in adjudging that it had jurisdiction of the subject-matter of said petition or of the person of appellant Jules S. Bache or of Sylvester H. Kneeland or the Farmers' Loan & Trust Company by virtue of the alleged power of distribution of the proceeds of sale alleged to have been reserved in the order confirming the sale under the decree of foreclosure, for that the court had no authority or power to make such reservation after such final decree of foreclosure and its affirmance in the circuit court of appeals.

16. The circuit court, in determining that it had jurisdiction to grant the relief prayed in said petition, and to decide as between the conflicting claims of appellant Bache on the one hand and said receiver Hunt or the Toledo, St. Louis and Western Railroad Company on the other, to the said one hundred and fifty-eight (158) bonds, coupons and stock in question, erroneously took into consideration matters outside of the record and not embraced in said petition or in said plea of appellant Bache, to wit:

155 "Bache, as a junior encumbrancer of the railroad and property of the Toledo, St. Louis and Kansas City Railroad Company, was made one of the original defendants in this suit, and entered his appearance herein on the 24th day of January, 1894, and afterwards set up his claim by answer in the foreclosure suit, and also proved it before the master in the creditors' suit, which is the same claim upon which his proceeding in the State court is founded.

* * * * * * *

"The Toledo, St. Louis and Kansas City Railroad Company, the Toledo, St. Louis and Western Railroad Company, the Continental Trust Company, as trustee of the mortgage securing the bonds, Sylvester H. Kneeland, Jules S. Bache, the Farmers' Loan and Trust Company, and the receiver, are the only parties who have any interest whatever in the bonds. These parties are all before the court except the Farmers' Loan and Trust Company, and is not a necessary party. The Toledo, St. Louis and Kansas City Railroad Company, the Continental Trust Company and Jules S. Bache were original parties to the suit.

As a junior encumbrancer, Bache has never been dismissed from the suit, and as such he is before the court for all the purposes of the distribution of the proceeds of the sale of the mortgaged property."

17. The circuit court, in determining that it had jurisdiction to grant the relief prayed in said petition, and to determine as between the conflicting claims of appellant Bache on the one hand and said receiver Hunt or the Toledo, St. Louis and Western Railroad Com-

pany on the other, to the said one hundred and fifty-eight (158) bonds coupons and stock in question, erroneously took into consideration matters outside of the record and not embraced in said petition, or in said plea of appellant Bache, to wit:

"When the receiver used the moneys of the receivership to discharge the underlying liens, an equitable right accrued to him and to those whom he represented to be reimbursed out of the bonds deposited with the Farmers' Loan and Trust Company, and that right became a part of the mortgaged property and passed by the sale to the purchaser, and is now vested in the Toledo, St. Louis and
156 Western Railroad Company. This right or equity is covered by the fourth paragraph on the decree of foreclosure which describes the property found by the court to be subject to the lien of the mortgage. The proceeds of the sale of the mortgaged property have not been distributed but are still under the control of the court. The distribution thereof was expressly 'reserved for future order' by the decree confirming the sale, and no order of distribution has since been made, and this court has exclusive jurisdiction to determine when, how and to whom the distribution shall be made, and, in ordering distribution, may if all the parties in interest are before the court, enforce the receiver's rights of reimbursement by setting apart for that purpose the distributive share of the proceeds of the sale to which the bonds in question may be entitled."

18. The circuit court erred in adjudging that it had jurisdiction to deal with the one hundred and fifty-eight (158) bonds, coupons and stock in question and to determine all conflicting claims to the same in the absence of the Farmers' Loan & Trust Company as a party to the controversy, and that said Farmers' Loan & Trust Company was not a necessary party and had no interest in such bonds, coupons and stock.

19. The circuit court erred in adjudging that its ancillary or dependent jurisdiction in the consolidated suit, if any it had, to determine the conflicting claims of appellant Bache on the one hand and said receiver Hunt or the Toledo, St. Louis & Western Railroad Company on the other, to said bonds and stock in question could be exercised under said petition or otherwise than by an original suit.

20. The circuit court erred in adjudging that it had jurisdiction to deal with said bonds, coupons and stock and to determine all conflicting claims to the same and in not holding that the supreme court of the State of New York had exclusive jurisdiction to do so.

21. The circuit court erred in entertaining jurisdiction of said petition, and entering the order on the thirteenth day of July, 1900, admitting James N. Wallace as a party respondent to said petition and dismissing Morton S. Paton and Richard B. Hartshorne.
157 22. The circuit court erred in entertaining jurisdiction of said petition, and entering the order of July 28th, 1900, substituting The Toledo, St. Louis and Western Railroad Company as petitioner in said petition in place of the said Samuel Hunt, as receiver.

JULES S. BACHE,
By SPIEGELBERG & WISE,
His Solicitors.

#1205. United States circuit court, northern district of Ohio, western division. Continental Trust Co. against Toledo, St. Louis & Kansas City Railroad Co. *et al.* In the matter of the petition of Samuel Hunt, as receiver, &c. Assignment of errors. Spiegelberg & Wise, solicitors for J. S. Bache. Filed, Dec. 4, 1902, Irvin Belford, clerk.

December Term, A. D. 1902, to wit, December 4, 1902.

Present: The Honorable Francis J. Wing, U. S. district judge.

Order Allowing Appeal.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, *against* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.* } No. 1205. In Equity.

CHARLES HAMLIN ET AL. *against* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland. } Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

And now, on this 4th day of December, 1902, being one of the days of the December term, 1902, of this court, and the same term at which the final decree was entered in the above-entitled cause upon the petition of Samuel Hunt, as receiver, filed in the
158 office of the clerk of this court on May 28th, 1900, comes Jules S. Bache, by Spiegelberg & Wise, his solicitors, and presents his petition praying an appeal from said decree and the intermediate orders entered upon said petition, to the Supreme Court of the United States, together with his assignment of errors heretofore filed herein, upon the ground that the jurisdiction of this court is in issue and that a certificate be made accordingly, and it appearing to the court that its jurisdiction is in issue, that due notice of this application with a request to join in the same and in such appeal has been given to Continental Trust Company of the City of New York, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan & Trust Company and James N. Wallace, and that they have failed to do so.

It is ordered that the appeal prayed for as aforesaid be and is hereby allowed to the said Jules S. Bache on the ground that the jurisdiction of this court is in issue and that a cost bond conditioned as required by law in the penalty of five hundred ($500) dollars,

with surety or sureties to the approval of this court or a judge thereof be filed within 20 days from the date hereof by the said Jules S. Bache and the clerk of this court is hereby directed upon the filing of said bond to transmit to the said Supreme Court a transcript of the record and proceedings and papers upon which said decree and orders were made, so far as they appertain to the said question of jurisdiction, duly authenticated.

159 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE City of New York, Survivor of John M. Butler, Complainant, *against* TOLEDO, ST. LOUIS AND KANSAS CITY Railroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *against* CONTINENTAL TRUST COMPANY OF THE City of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

To Continental Trust Company of the City of New York, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan and Trust Company, and James N. Wallace:

You, and each of you, are hereby notified that immediately upon the entering of a final decree on the above-mentioned petition, or as soon thereafter as counsel can be heard, we shall apply to the above-named circuit court, on behalf of Jules S. Bache, for the allowance of an appeal to the Supreme Court of the United States, from the said decree and all intermediate orders entered on said petition, and for a certificate that the jurisdiction of the court is in issue with respect to each and all of said orders and decrees, and you are severally requested to join in said appeal and the assignment of errors.

SPIEGELBERG & WISE,
Solicitors for Jules S. Bache.

E. D. POTTER, *Counsel.*

160 Copy of this paper served on M. L. Crowell, at Toledo, Ohio, on Saturday, Sep. 13, 1902, at 10.35 a. m., said M. L. Crowell being secretary of the Toledo, St. Louis and Kansas City Railroad Company.

J. W. LYONS.

(Endorsement:) United States circuit court, northern district of Ohio, western division. Continental Trust Co. against Toledo, St. Louis & Kansas City Railroad Company, *et al.* In the matter of the petition of Samuel Hunt, as receiver, &c. Notice of application for allowance of appeal and certificate. Spiegelberg & Wise, solicitors for J. S. Bache, 44 Broad street, New York. Filed. Dec. 4, 1902. Irvin Belford, clerk.

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *against* TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *against* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

161 To Continental Trust Company of the City of New York, Richard B. Hartshorne, Morton S. Paton, Toledo, St. Louis and Kansas City Railroad Company, Sylvester H. Kneeland, The Farmers' Loan & Trust Company, and James N. Wallace:

You, and each of you, are hereby notified that immediately upon the entering of a final decree on the above-mentioned petition, or as soon thereafter as counsel can be heard, we shall apply to the above-named circuit court, on behalf of Jules S. Bache, for the allowance of an appeal to the Supreme Court of the United States from the said decree and all intermediate orders entered on said petition, and for a certificate that the jurisdiction of the court is in issue with respect to each and all of said orders and decrees, and you are severally requested to join in said appeal and the assignment of errors.

SPIEGELBERG & WISE,
Solicitors for Jules S. Bache.

(*Proof of Service.*)

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY ET AL., Respondents.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK ET AL., Cross-respondents.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company, filed in the office of the clerk of this court on the 28 day of May, 1900.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

John Manheimer, being duly sworn, deposes and says that he is a clerk in the office of Spiegelberg & Wise, solicitors for Jules S. Bache, and that he is over 21 years of age.

162 That he served the annexed notice by delivering a true and correct copy thereof to the following-named persons and corporations on the following dates:

On the 13th day of September, 1902, on the Continental Trust Company of the City of New York, by delivering the same to Henry E. Daboll, the treasurer of said corporation, at the office of said corporation, No. 30 Broad street, in the city of New York.

On the 12th day of September, 1902, on James N. Wallace at No. 54 Wall street, New York city, by delivering a copy thereof to him personally.

On the 15th day of September, 1902, on the Farmers' Loan & Trust Company by delivering the same to A. V. Heely, the assistant secretary at the office of said corporation, at No. 22 William street, New York city.

That he knew the person thus served to be the individual mentioned, and that he knew that Henry E. Daboll is the treasurer of the said Continental Trust Company of the City of New York, and that A. V. Heely is the assistant secretary of the Farmers' Loan & Trust Company.

J. MANHEIMER.

Subscribed and sworn to before me this 18th day of Sept. 1902.

[SEAL.] ALEX. L. STROUSE,
Notary Public #307, *N. Y. County.*

(*Proof of Service.*)

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY ET AL., Respondents.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK ET AL., Cross-respondents.

163 In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Alex. L. Strouse, being duly sworn, deposes and says that he is a clerk in the office of Spiegelberg & Wise, solicitors for Jules S. Bache, and that he is over 21 years of age.

That on the 17th day of September, 1902, he served the annexed notice on Sylvester H. Kneeland at his office at No. 32 Broadway, New York city, by delivering to and leaving with him a true and correct copy thereof.

That he knew the person thus served to be the person mentioned and described in said notice.

ALEX. L. STROUSE.

Subscribed and sworn to before me this 18th day of Sept. 1902.

[SEAL.]

J. MANHEIMER,
Notary Public, N. Y. Co.

(Endorsement:) United States circuit court, northern district of Ohio, western division. Continental Trust Co. against Toledo, St. Louis & Kansas City Railroad Co. *et al.* In the matter of the petition of Samuel Hunt, as receiver, &c. Notice of application for allowance of appeal and certificate. Spiegelberg & Wise, solicitors for J. S. Bache, 44 Broad street, New York. Received a copy of this paper on Sep. 17, 11.58 a. m., 1902. Butler, Notman, Joline & Mynderse, att'ys for Paton & Hartshorne, purchasers. Filed. Dec. 4, 1902. Irvin Belford, clerk.

164 Circuit Court of the United States, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*, Respondents.
} No. 1205. In Equity.

CHARLES HAMLIN ET AL., Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.
} Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

Know all men by these presents: That we, Jules S. Bache, as principal, and The Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact business pursuant to the act of Congress approved August 13th, 1894, as surety, are held and firmly bound unto Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, and the Toledo, St. Louis and Western Railroad Company, in the full and just sum of five hundred dollars, to be paid to the said Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company and the Toledo, St. Louis and Western Railroad Company, their successors and assigns, for which payment, well and truly to be made, the said Jules S. Bache binds himself, his heirs, executors and administrators, and the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, jointly and severally, firmly by these presents.

165 Sealed with our seals. Dated the sixth day of December, one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States, for the northern district of Ohio, western division, in a suit pending in said court, between The Continental Trust Company of the City of New York, survivor of John M. Butler, complainant, against Toledo, St. Louis and Kansas City Railroad Company, *et al.*, respondents, and Charles Hamlin, *et al.* cross-complainants, against The Continental Trust Company of the City of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, cross-respondents, a final decree was entered in the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of said court, on May 28, 1900, and the said Jules S. Bache, having obtained an order allowing an appeal to the Supreme Court of the United States and filed

the same in the clerk's office of the said circuit court, to reverse the decree in the aforesaid suit, and a citation directed to the said above-named Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, and the Toledo, St. Louis and Western Railroad Company, is about to be issued citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington:

Now, the condition of the above obligation is such, that if the said Jules S. Bache, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his said plea good, then this obligation to be void; otherwise, to remain in full force and virtue.

JULES S. BACHE. [SEAL.]
[CORPORATE SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
HENRY B. PLATT, *Vice-President.*

Attest: JAMES R. KINGSLEY,
Attorney-in-fact.

STATE OF NEW YORK,
County of New York, } *ss:*

166 On this eighth day of December, 1902, before me personally appeared Jules S. Bache, to me known and known to me to be the individual described in, and who executed the foregoing instrument, and duly acknowledged to me that he executed the same.

[SEAL.]
ALEX. L. STROUSE,
Notary Public, New York County.

Approved:
FRANCIS J. WING, *Judge.*

(Endorsement:) Circuit court of the U. S. Northern district of Ohio, western division. Continental Trust Company of the City of New York, survivor of John M. Butler, complainant, against Toledo, St. Louis and Kansas City Railroad Company, *et al.*, respondents. Bond. Filed. Dec. 10, 1902. Irvin Belford, clerk. Fidelity and Deposit Company of Maryland. 35 Wall street, New York.

167 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel Hunt, as receiver of the St. Louis, Toledo & Kansas City Railroad Company and Toledo, St. Louis & Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the city of Washington in the District of Columbia within thirty days from the date of this writ, pursuant to an appeal filed in the office of the clerk of the circuit court of the United States for the northern district of Ohio, western division, wherein Jules S. Bache is appellant and you are appellees, to show cause, if any there be, why the decree and

the orders in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness Hon. Melville W. Fuller, Chief Justice of the United States, the 10th day of December in the year one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-seventh.

FRANCIS J. WING,
United States District Judge, Presiding in the Circuit Court.

Service of above citation acknowledged this 10th day of December, 1902.

SAM'L HUNT, *Rec'r, and*
TOLEDO, ST. LOUIS & WESTERN RAILROAD CO.,
By CLARENCE BROWN, *Solicitor.*

Toledo, Ohio, Dec. 10, 1902.

168 In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler, Complainant, *against* TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COMPANY *et al.*, Respondents.	No. 1205. In Equity.
CHARLES HAMLIN ET AL., Cross-complainants, *against* CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, S. H. Kneeland, Cross-respondents.	Cross-bill.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, A. D. 1900.

To the clerk of the above-entitled court:

You will please prepare the transcript of the record in the matter of the petition of Samuel Hunt, as receiver, etc., filed May 28th, 1900, in the above-entitled cause, to be filed in the office of the clerk of the Supreme Court of the United States, under the appeal heretofore perfected to said court by Jules S. Bache and include in said transcript the following pleadings, proceedings and papers on file:

First. The petition of Receiver Hunt, filed May 28th, 1900, together with the exhibits thereto attached, marked A to K.

Second. Plea of Jules S. Bache to said petition filed July 28, 1900.

Third. Motion and order dismissing Hartshorne and Paton and making Wallace a party, filed July 13, 1900.

Fourth. Motion and order substituting Toledo, St. Louis & Western Railroad Company filed July 28, 1900.

Fifth. Notice of motion setting down plea for argument, filed ——.

169 Sixth. Order overruling plea of Jules S. Bache, filed December 14th, 1901.

Seventh. Opinion of the court on overruling said plea, filed December 4th, 1901.

Eighth. Order taking decree *pro confesso* against Jules S. Bache, filed April 7, 1902.

Ninth. Final decree filed December 4th, 1902.

Tenth. Petition for appeal and assignment of errors filed December 4th, 1902.

Eleventh. Order allowing appeal filed December 4th, 1902.

Twelfth. Notice of application for allowance of appeal together with proof of service, filed December 4th, 1902.

Thirteenth. Cost bond filed December 10, 1902.

Fourteenth. Citation and proof of service.

You will also please include in said transcripts all entries of any other pleadings, proceedings and papers on your appearance docket in the matter of the petition of Samuel Hunt, etc., as aforesaid, and certify to that effect; said transcript to be prepared as required by law and the rules of this court and of the Supreme Court of the United States, before the ninth day of January, 1903.

SPIEGELBERG & WISE,
Solicitors for Appellants.

Dated Dec. 10th, 1902.

(Endorsement:) United States circuit court. Northern district of Ohio, western division. Continental Trust Company against Toledo, St. Louis & Kansas City Railroad Co. *et al.* In the matter of the petition of Samuel Hunt, as receiver, &c. Præcipe. Spiegelberg & Wise solicitors for J. S. Bache, 44 Broad street, New York. Filed. Dec. 10, 1902. Irvin Belford, clerk.

170 United States Circuit Court, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE City of New York *et al.*
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY Railroad Company *et al.*
No. 1205. In Equity.

In the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed in the office of the clerk of this court on the 28th day of May, 1900.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of so much of the original pleadings, records, papers, exhibits and other proceedings in the above-entitled cause as I am requested by counsel to include therein, as shown by the præcipe filed in the said case, a copy of which is hereto attached, and which I am advised are necessary to the hearing in the Supreme Court of the United States. I further certify that the foregoing transcript contains all the papers which appear noted on the appearance docket in the above-entitled cause in the matter of the petition of Samuel Hunt, as receiver, etc.; I do further certify that there is attached to and transmitted therewith a copy of the opinion of the court filed in the therein-entitled matter, and the citation issued therein.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court at Toledo, in said district, on this 19th day of December, A. D. 1902, and of the 127th year of the Independence of the United States of America.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD, *Clerk*,
By J. W. WILSON,
Deputy Clerk.

Endorsed on cover: File No. 18,765. N. Ohio C. C. U. S. Term No. 537. Jules S. Bache, appellant, *vs.* Samuel Hunt, as receiver of the St. Louis, Toledo and Kansas City Railroad Company & Toledo, St. Louis & Western Railroad Company. Filed December 29, 1902.

a

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE, APPELLANT,

vs.

SAMUEL HUNT, AS RECEIVER, ET AL.

WRIT OF CERTIORARI AND RETURN THERETO.

FILED FEBRUARY 1, 1904.

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of Ohio, Greeting:

[Seal of the Supreme Court of the United States.]

Whereas, in a certain suit in said circuit court between Continental Trust Company of the City of New York, survivor of John M. Butler, and Toledo, St. Louis & Kansas City Railroad Company *et al.*, in the matter of the petition of Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company, No. 1205, in equity, which suit was removed to the Supreme Court of the United States by virtue of an appeal taken by Jules S. Bache, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

2 "That a certain decree of foreclosure and sale entered in the said circuit court in the suit of The Continental Trust

Company of the City of New York against The Toledo, St. Louis and Kansas City Railroad Company and others, on the first day of April, 1898, and a certain order of confirmation of sale entered in the said circuit court, in said cause, on the 18th day of April, 1900, are omitted from said record."

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find, to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of January A. D. 1904.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

3 UNITED STATES OF AMERICA, }
Northern District of Ohio. }

In pursuance of the command of the within writ of certiorari, I, Irvin Belford, clerk of the circuit court of the United States, within and for the northern district of Ohio, do herewith transmit, under the seal of said court, a full and complete copy of a certain decree of foreclosure and sale entered in the said circuit court in the suit of The Continental Trust Company of the City of New York against The Toledo, St. Louis and Kansas City Railroad Company and others, on the first day of April, 1898, and a certain order of confirmation of sale entered in the said circuit court, in said cause, on the 18th day of April, 1900, and omitted from the record of said cause now pending on appeal in the Supreme Court of the United States, and which by the command of said writ were ordered to be returned.

In testimony whereof, I have affixed my signature as clerk of said court and the seal thereof, at Toledo, in said district, this 29th day of January, A. D. 1904, and in the 128th year of the Independence of the United States of America.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD,
Clerk of the Circuit Court of the United States for the Northern District of Ohio.

4 United States Circuit Court, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE CITY of New York *et al.*
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company *et al.*
} No. 1205. In Equity.

In the Matter of the Petition of SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company.

Record of the decree of foreclosure and sale entered in the said circuit court, in the suit of the Continental Trust Company of the City of New York against the Toledo, St. Louis and Kansas City Railroad Company and others, on the first day of April, 1898, and a certain order of confirmation of sale entered in the said circuit court, in said cause, on the 18th day of April, 1900.

5 December Term, A. D. 1897, to wit, April 1st, 1898.

Present: Honorable William H. Taft, circuit judge.

CONTINENTAL TRUST COMPANY OF THE CITY of New York, Survivor of John M. Butler,
against
TOLEDO, ST. LOUIS AND KANSAS CITY RAILroad Company, Joseph S. Stout, Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache, Oliver & Roberts Wire Company, George B. Cass, Oliver Adams, Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin, Ellen V. Hamlin.
} In Equity. No. 1205.

CHARLES HAMLIN, HANNIBAL E. HAMLIN, Frank Hamlin, and Ellen V. Hamlin, Cross-complainants,
against
CONTINENTAL TRUST COMPANY OF THE CITY of New York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents.
} Cross-bill.

6 Now, on this fifteenth day of January, 1898, this cause came on to be heard upon the bill of complaint of the Continental Trust Company of the City of New York and John M. Butler, filed

on the 13th day of December, 1893, and upon the answers thereto of the respective respondents, and upon the replications to said answers filed by said complainants, and upon the answer and cross-bill of Charles Hamlin and others, filed on the 15th day of October, 1895, the replication of said answer of said cross-complainants, the answer of the complainant Continental Trust Company of the City of New York to said cross-bill, and the replication thereto, and upon the proofs taken under the issues raised by said pleadings and on all proceedings under said bill and cross-bill; and this cause also coming on to be heard on the amended intervening petition of Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotive Works, the Rhode Island National Bank and the Signal Oil Works, Limited, filed October 28, 1897, and the answer thereto of said trust company, the surviving complainant, and on the proofs taken under said amended intervening petition and said answer.

This cause having been argued by counsel, the court, being fully advised in the premises, finds and decrees as follows:

First. All the material allegations of said bill of complaint of the Continental Trust Company of the City of New York and John M. Butler are true.

Second. At all the times in said bill of complaint mentioned, the respondent The Toledo, St. Louis and Kansas City Railroad Company was, and it now is, a corporation duly organized and existing under and by virtue of the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, and owned and operated a line of railroad, extending from Toledo, in the State of
7 Ohio, through the States of Ohio, Indiana and Illinois, to the city of East St. Louis, in the county of St. Clair, in said State of Illinois.

Third. In the exercise of the powers possessed by it under the laws of the said States of Ohio, Indiana and Illinois, and in pursuance of proper corporate action to that end, said respondent Toledo, St. Louis and Kansas City Railroad Company, on or about the 19th day of June, 1886, in accordance with resolutions passed by its board of directors and by its stockholders, at respective meetings thereof, duly called, duly made and executed under its corporate seal, attested by the signatures of its president and secretary, its 9,800 bonds bearing date the nineteenth day of June, 1886, and by the terms of each thereof, said respondent railroad company promised to pay to the bearer, at the agency of said respondent railroad company in the city of New York, the sum of one thousand dollars in gold coin of the United States of the then present standard of weight and fineness, on the first day of June, 1916, and to pay interest on said principal sum semi-annually, at its agency in the city of New York, in like gold coin, at the rate of six per cent. per annum, from the first day of June, 1886, on the first days of June and December in each year, until the payment of said principal sum, on presentation and surrender of coupons for such interest

annexed to said bonds, as said coupons should severally become due.

To secure the payment of said bonds and the coupons thereto attached, according to the tenor and effect of said bonds and coupons, said respondent railroad company, on or about said 19th day of June, 1886, in pursuance of proper resolutions of its board of directors and of its stockholders, duly executed, acknowledged and delivered to the American Loan and Trust Company, a corporation duly organized and existing under and by virtue of the laws
8 of the State of New York, and Joseph E. McDonald, of the city of Indianapolis, in the State of Indiana, its certain indenture of mortgage or deed of trust, a copy whereof is annexed to said bill of complaint of said Continental Trust Company of the City of New York and John M. Butler, commonly known and hereinafter called the first mortgage of said respondent railroad company, and thereby conveyed to said American Loan and Trust Company and said Joseph E. McDonald, upon the trusts therein set forth the lines of railroad, equipment, franchises and property in said first mortgage and in said bill of complaint particularly described.

Said first mortgage was forthwith duly recorded in the offices of the recorders and clerks of the various counties through which said mortgaged railroad ran and in which said mortgaged property was situated.

Fourth. Said first mortgage is a valid and subsisting lien upon the following railroads, property and franchises, to wit, the line of railroad of said mortgagor, commencing in the city of Toledo, at or near the business centre thereof, in the county of Lucas, in the State of Ohio, and running thence through said State of Ohio, the State of Indiana and the State of Illinois, to the city of East St. Louis, in the county of St. Clair, in said State of Illinois, a distance of about four hundred and fifty miles; all other railroads and interests in railroads owned by said respondent railroad company at the date of the execution of said first mortgage, or at any time thereafter by it acquired or held in trust for it or for its benefit; all lands, roadways, tracks, superstructures, rails, sidings, turn-outs, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station houses, engine houses, car houses, freight houses, warehouses, elevators, docks, buildings, repair shops, machines shops, depot grounds and
9 lands, sidings, all buildings, all structures, all erections and all improvements owned by said respondent railroad company, at the date of the execution of said first mortgage, or at any time thereafter by it acquired or held in trust for it or for its benefit; all leases and leasehold interests, contracts, choses in action, including bills receivable, traffic balances and claims of every character, and all books of account or of record and all minute books, documents and papers owned by said respondent railroad company at the date of the execution of said first mortgage or which it has since at any time acquired; all easements and privileges, including

all rights of way granted by cities and towns through and along streets, squares, avenues, alleys, and public grounds, and all terminal facilities property, rights and structures of every description held or owned by said railroad company at the date of the execution of said first mortgage or to which it was then entitled, or which it has since acquired, or to which it has since become entitled, or held in trust for it, or for its benefit; including all terminal facilities, all property and privileges of every kind, and nature, and all rights of way and franchises that belonged to the Toledo, Delphos and Burlington Railroad Company, and to the companies that consolidated with the said Toledo, Delphos and Burlington Railroad Company, and all the property, rights of way, terminal facilities and privileges that belonged to the Toledo, Cincinnati and St. Louis Railroad Company, including all companies that by consolidation formed said last mentioned company in the said line of railroad running from Toledo, Ohio, to East St. Louis, Illinois, and all rights and privileges thereunto appertaining; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to the Toledo, Charleston and St. Louis Railroad Company, of Illinois; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to the Bluffton, Kokomo and South-western Railroad Company, of Indiana; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to the Toledo, Dupont and Western Railway Company, of Ohio; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to and became vested in Sylvester H. Kneeland, the purchaser thereof, at judicial sale, on the thirtieth day of December, A. D. 1885, at the city of Indianapolis, Indiana; all locomotives, tenders, passenger cars, baggage cars, freight cars and other cars, and all other rolling stock and equipment of every character and description, and all interests in rolling stock and equipment, at the date of the execution of said first mortgage owned or possessed by said Toledo, St. Louis and Kansas City Railroad Company, or held in trust for it or for its benefit, or which it, at any time or times, since, has acquired, or to which it has become entitled, or which may have been or may be held in trust for it or for its benefit; all machinery, tools and implements, rails, fastenings and spikes, materials and supplies owned by said railroad company at the date of the execution of said first mortgage, or by it at any time thereafter acquired; all rights, privileges and franchises which said Toledo, St. Louis and Kansas City Railroad Company at the date of the execution of said first mortgage held, possessed, or was entitled to, and also all rights, privileges and franchises which said railroad company has acquired or become possessed of or entitled to, for, or in respect of, or for the uses or purposes of its said lines of railroad or the operation or maintenance of the same, or any part thereof, and all other property, rights to property or interests in property of whatever description owned by the

respondent railroad company at the date of the execution of its said first mortgage or thereafter at any time by it acquired, or held in trust for it for its benefit, in extension of, or appurtenant, or incidental to the railroad and property above described, or described in and covered by said first mortgage; and also all materials
11 and supplies, all equipment and rolling stock and all interests therein, and all other property, real, personal and mixed, and interests in property, and all choses in action, at any time prior to the delivery to the purchasers of the property sold under this decree acquired by any receiver in this cause, or becoming vested in any receiver in this cause, or held in trust for him or for his benefit, and all moneys, profits and income derived, or at any time hereafter to be derived, by any receiver in this cause from the operation of the property herein adjudged to be subject to said first mortgage.

Fifth. Thereafter, and on and subsequent to said 19th day of June, 1886, said respondent railroad company issued and delivered its said first mortgage bonds to the amount of $9,000,000, with the coupons thereto attached, and duly certified by said American Loan and Trust Company, one of said trustees under said first mortgage securing the same. All said first mortgage bonds so issued are now outstanding in the hands of divers persons and corporations, who are owners and holders thereof for value.

Sixth. Said Joseph E. McDonald, one of the trustees named in said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, died after the execution and delivery of said first mortgage, and said American Loan and Trust Company, the other trustee named in said first mortgage, became insolvent after the execution and delivery thereof, and thereafter, in pursuance of the laws of the State of New York, was dissolved.

Under and in pursuance of the provisions of said first mortgage, the complainant Continental Trust Company of the City of New York, a corporation organized and existing under the laws of the State of New York, and the complainant John M. Butler had, prior to the time of filing their said bill, been duly appointed trus-
12 tees under said first mortgage and had respectively accepted said trust, and were, at the time of filing their said bill, the trustees under said first mortgage, and vested with all the estates, trusts, powers and duties of the original trustees under said first mortgage. Said Butler has since died and said trust company is now sole trustee under said mortgage.

Seventh. On or about the 18th day of May, 1893, the respondents, Joseph S. Stout and Randolph F. Purdy, severally of the city, county and State of New York, and citizens of said State of New York, filed their bill in this court against said Toledo, St. Louis and Kansas City Railroad Company, alleging its insolvency and praying for the appointment of receivers of its property. Thereupon, and on or about said day, by order of this court, Samuel R. Callaway was ap-

pointed receiver of said Toledo, St. Louis and Kansas City Railroad Company, and all its property wherever situated, and was thereby authorized, empowered and instructed, among other things, to enter upon and take possession of all such property, and to manage, control and operate the same; thereafter in an action of similar character, instituted in the circuit court of the United States for the district of Indiana by said complainants against said respondent, a similar order was made by said court, and thereafter, in an action of similar character, instituted in the circuit court of the United States for the southern district of Illinois by said complainant against said respondent, a similar order was made by said court. Said Samuel R. Callaway, appointed receiver as aforesaid, thereafter, and on or about the 22d day of May, 1893, duly qualified as such receiver and as such receiver entered upon and took possession of the railroad and property of said respondent Toledo, St. Louis and Kansas City Railroad Company, being the same property embraced in said first mortgage of said railroad company, and used and
13 operated the same; and said mortgaged railroad and property was, at the time of the filing of their bill of complaint by said Continental Trust Company of the City of New York and John M. Butler, operated by the said Samuel R. Callaway, as receiver as aforesaid, and was in the possession of said circuit court of the United States for the northern district of Ohio, for the district of Indiana and for the southern district of Illinois.

Eighth. Said Toledo, St. Louis and Kansas City Railroad Company failed to pay the interest on its said bonds secured by its said first mortgage, which accrued and became due and payable on the first day of June, 1893, and the coupons for such interest which matured on said day, although payment of said interest and of said coupons was duly demanded as said interest became due and said coupons matured.

Said respondent railroad company also failed to pay the installment of interest on its first mortgage bonds secured by said first mortgage, which became due and payable on the 1st day of December, 1893. Default in the payment of said interest maturing June 1, 1893, in respect of all said bonds, continued for the space of more than six months, and on about December 4, 1893, in pursuance of the powers conferred by said mortgage, the holders of one-half part of said bonds outstanding, elected and declared the whole of said first mortgage bonds to be due and payable.

Ninth. The principal of all said bonds is now due and payable, and there is due and owing in respect of said first mortgage bonds, at the date of the entry of this decree, the principal thereof, $9,000,000, and for the interest thereon, the following amounts:

	Interest maturing June 1, 1893.....	$270,000
	Interest thereon to the date of this decree.....	78,300
	Interest maturing December 1, 1893.....	270.000
14	Interest thereon to the date of this decree.....	70,200
	Interest on said principal sum from December 1, 1893, to the date of this decree.....	2,340,000
	Amounting in the aggregate to the sum of.....	$12,028,500

Tenth. Said line of railroad covered by said first mortgage constitutes and forms one railroad system, and with all said equipment, franchises and appurtenances has hitherto been owned and operated as an entirety, and it is for the interest of the mortgagor and its creditors and of all parties that it should be sold as an entirety. The value of it in portions and sections is and will be much less than its value as a whole, and said mortgaged premises are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

It is therefore considered, ordered and decreed as follows:

I. Said first mortgage of the respondent railroad company is a valid lien upon the railroad equipment and other property and franchises described therein as aforesaid, and as hereinabove found and decreed, to secure said bonds and coupons issued thereunder, and the amount hereinabove found and decreed to be due thereon, to wit, said sum of $12,028,500, with interest from the date of this decree.

II. The respondent, The Toledo, St. Louis and Kansas City Railroad Company do pay or cause to be paid within sixty days after the entry of this decree, to the complainant, Continental Trust Company, of the City of New York, for the use and benefit of the holders of said outstanding first mortgage bonds and coupons, the
15 amount hereinbefore found to be due in respect thereof, namely the sum of twelve million and twenty-eight thousand five hundred dollars ($12,028,500) with interest thereon from the date of this decree to the date of payment, and, in addition thereto, do pay into this court, such sums of money as may be required by the court in order to pay and satisfy all costs and expenses of this action, including the payment of all outstanding obligations of the receiver in this cause, the proper compensation of the receiver in this cause, and all expenses of such receivership and also such expenses and compensation of the trustee and its counsel as may be approved and allowed by the court. If such payment shall be made, any of the parties hereto may apply to this court for such further directions as may be just and equitable.

III. In default of such payment by the respondent railroad company, or some one claiming under it, or by any one for its account, within the time directed as aforesaid, the railroad, equipment, franchises and property herein, adjudged to be subject to said first mortgage and hereinabove described, shall be sold as an entirety, in one

lot or parcel, as hereinafter directed, and all the right, title, estate, interest and equity of redemption of said respondent railroad company and of the complainant, Continental Trust Company, of the City of New York, as trustee under said first mortgage, and of all other parties to this action and of all persons claiming under them or any of them of, in or to said property and every part and parcel thereof, shall be forever barred and foreclosed.

IV. Such sale shall be made without valuation, appraisement, redemption or extension, and shall be made by and under the direction of Hiram D. Peck, of Cincinnati, and William A. Van Buren, of Indianapolis, who are hereby appointed special masters
16 for that purpose, and who are directed to make and conduct said sale, and to execute a deed or deeds of conveyance of the property sold, to the purchaser or purchasers thereof, upon an order confirming such sale and upon payment or settlement of the purchase price bid as hereinafter provided. Said sale shall be made at public auction to the highest bidder, at the terminal freight station of the respondent railroad company on Erie street in the city of Toledo, in the State of Ohio, on the property to be sold, on a day and at an hour to be fixed by said special masters, at the request of the solicitors for the complainant or upon further order of the court, and notice of the time, place and terms of said sale, describing briefly the property to be sold and referring to this decree, shall be published at least once a week for six successive weeks preceding the date of such sale, in at least one newspaper in each of the following places, to wit, the city of Toledo in the State of Ohio, the city of Frankfort in the State of Indiana, the city of East St. Louis in the State of Illinois, and the city of New York in the State of New York. The special masters may, at the request of the complainant's solicitors, adjourn or postpone said sale and may, without further notice, proceed with the sale on any day to which the same may thus have been adjourned, or they may give such further notice of sale in addition to the notice above described or of any adjournment thereof, as the complainant's solicitors may request.

V. The special masters shall receive no bid from any one offering to bid who shall not first deposit with him, as a pledge that he will make good his bid in case of its acceptance, the sum of twenty-five thousand dollars ($25,000) in a certified check on some national bank or incorporated trust company made payable to the order of the clerk of this court. The deposit so received from any unsuccessful bidder shall be returned to him when the property shall
17 be struck down. The deposit so received from any successful bidder shall be at once deposited in the registry of this court and shall be applied on account of the purchase price of the property. The special masters shall accept no bid for said mortgaged property less than the sum of $7,500,000 for the entire road and for the Ohio part thereof an amount proportioned to said sum on a mileage basis, and unless such sum shall be bid, the special masters shall adjourn the sale and apply to the court for further instructions. Upon

the acceptance of any bid, the purchaser shall forthwith pay to the special masters the sum of $75,000 in a certified check on any national bank or any trust company payable to the order of the clerk of this court. Any cash or check which may have previously been deposited by the successful bidder as a pledge that he will make good his bid shall be received on account of the amount so payable by him on the acceptance of his bid. All sums of money received by the special masters on any accepted bid shall be forthwith deposited in the registry of the court. In case any bidder shall fail to make good his bid upon its acceptance by the special masters, or shall fail after such acceptance to comply with any order of the court relating to the payment thereof or the consummation of the purchase, then the sums deposited by such purchaser or purchasers as hereinbefore provided shall be forfeited as a penalty for such failure, and shall be applied to the payment of the expenses of the resale, and toward making good any deficiency or loss in case the property shall be sold at a less price on such resale. If such sale shall not be confirmed by the court, such deposit shall be returned to the bidder. The purchaser shall, on the confirmation of the sale by the court, make such further payment or payments in cash on account of the purchase price, as the court may from time to time direct. So much of the purchase price as may not be required by the court to be paid in cash may either be paid in cash or the purchaser may satisfy
18 and make good such residue of his bid in whole or in part by turning in to be canceled or credited, as hereinafter provided, the first mortgage bonds and coupons to be paid out of the proceeds of the sale upon distribution thereof as hereinafter set forth, and said purchaser shall be credited therefor on account of the purchase price such sums in cash as would be payable in respect of such bonds and coupons out of the proceeds of sale if the whole amount of the purchase price were payable in cash. The court reserves the right to resell the property upon such notice as the court may direct, in case the purchaser shall fail or omit to make any payment on account of the unpaid balance of the purchase price within thirty days after the entry of the order requiring such payment. All sums of money and all bonds and coupons received by the special masters shall be forthwith deposited in the registry of this court. The purchaser or purchasers, his or their successors or assigns, shall not be bound to inquire or see to the application of the purchase money. The complainant, Continental Trust Company of the City of New York, or any holder or holders of any of said first mortgage bonds, may bid and purchase at said sale.

The purchaser or purchasers, his or their successors and assigns, shall have the right to enter his or their appearance in this court, and he or they, or any of the parties to this suit, shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser or purchasers, his or their successors or assigns,

or which would be payable out of the purchase price, and he or they may appeal from any decision relating to any such claim, demand or allowance.

19 VI. The funds arising from the sale of the said mortgaged premises shall be applied as follows:

(1.) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the special masters appointed to make the sale, which, exclusive of his necessary expenses, shall not exceed $1,250 to each special master, and the payment of all charges, compensations, allowances and disbursements of the complainant, The Continental Trust Company of the City of New York, and its solicitors and counsel, and of the said John M. Butler, the deceased complainant, and of the receiver, and also all other proper allowances, compensation and disbursements. All of the payments to be made under this subdivision shall be hereafter fixed and allowed and taxed by this court.

(2.) To the payment of any receiver's certificates and liabilities issued or incurred under the order of this court, and then outstanding, together with the interest accrued thereon to the date of payment.

(3.) To the payment, so far as the same shall not theretofore have been paid by the receiver in this cause, of the following amounts found by decrees of the circuit court of the United States for the district of Indiana, entered August 14, 1893, and September 26, 1893, to be due under prior decrees of said court against S. H. Kneeland for the payment of part of the purchase price bid by said Kneeland on the foreclosure sales under decrees of said court, of the Toledo division and the St. Louis division, respectively, of the Toledo, Cincinnati and St. Louis Railroad Company, to wit, to the American Surety Company, the sum of $323,909.99 and interest thereon at the rate of six per cent. per annum from the first day of July, 1894; to the Northern National Bank of Toledo, the

20 sum of $33,310.05 and interest thereon at the said rate from the first day of January, 1898; to the State Trust Company, the sum of $52,247.30 and interest thereon at the rate aforesaid from the first day of January, 1898, and to John T. Newton, the sum of $74,625.28 and interest thereon at the rate aforesaid from the first day of January, 1898.

(4.) To the payment of any claims to recover which intervening petitions have been filed and are now pending herein, and in which it shall be adjudged by this court that the same are prior in lien to said first mortgage of said respondent railroad company.

(5.) Any residue of the fund realized from said sale shall be applied to the payment of the principal of said first mortgage bonds and the interest and coupons thereon, with interest from the date of this decree to the date of payment. Any coupons upon said first mortgage bonds maturing prior to June 1, 1893, the validity of which may be duly established in this case, shall be entitled, with

interest thereon from the maturity thereof to the date of this decree to share *pro rata* with the bonds and coupons hereinabove adjudged to be outstanding in the proceeds of sale of the mortgaged property.

In case said residue shall be insufficient to pay said first mortgage bonds, and said coupons and interest thereon in full, then the same shall be paid *pro rata* without discrimination between the bonds and coupons, and each of said bonds presented for payment shall be stamped by the special master so as to show the amount which has been paid on such bonds and the coupons thereto attached, or, if presented by the purchaser or purchasers, the amount credited as paid thereon, and shall be returned to the holders thereof. Any detached coupons for interest on said
21 first mortgage bonds shall be stamped in such manner as to indicate that they have been partly paid.

(6.) If, after making all the foregoing payments there shall be any surplus, then the same shall be applied as the court shall thereafter order and direct.

All payments for any of the purposes aforesaid made by the purchaser shall be treated as advances, and subject to final adjustment.

When the special masters shall be prepared to pay out of the proceeds of sale the bonds or coupons to be paid as above specified they shall give notice of the time when and place where they will be prepared to make such payment, by publication at least once a week for two successive weeks in a newspaper published in the city of New York, and no holder of any claim or bond or coupon of the payment of which notice shall have been so given, who shall fail to present the same for payment at the time and place specified, shall be entitled to the payment of any interest thereon after the date out of the proceeds of the sale, and said special masters may make such payment in the city of New York and personally, or through any bank or bankers, or through the complainant, The Continental Trust Company of the City of New York.

VII. Upon confirmation of said sale and payment of the purchase price bid by the purchaser or purchasers of said property, or upon making such provision for the payment thereof as the court shall approve, the said special master making the sale shall execute a deed or deeds and other proper instruments conveying and transferring the property purchased to such purchaser or purchasers or his or their successors or assigns; and upon the execution and delivery of such deed or deeds, the grantee therein shall be let into possession of the premises and property conveyed and trans-
22 ferred and the complainant, The Continental Trust Company of the City of New York, shall thereupon be discharged of its trust in the premises, except as to the distribution of any money in its hands, and as to the entry, collection and distribution of any deficiency judgment which it may obtain, and the receiver herein, and any party to this suit having possession of the same, shall deliver

such property over to the purchaser or purchasers, his or their successors or assigns, together with any property and income theretofore acquired or received by any receiver since the commencement of this suit, in the management or operation of the mortgaged premises; subject, nevertheless, to the condition that the court may retake and resell the property conveyed, in case the purchaser or purchasers, his or their successors or assigns, shall fail within the time hereinabove limited to pay any balance of the purchase price remaining unpaid.

The purchaser or purchasers, and his or their successors and assigns, shall, after such delivery of the premises, hold, possess and enjoy the said railroad, premises and property and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as said respondent, Toledo, St. Louis and Kansas City Railroad Company, now holds or enjoys or held or enjoyed the same at the time of the execution and delivery of said first mortgage or at any time since was or is entitled to hold or enjoy the same; and the respective purchaser or purchasers and his or their successors and assigns, shall thereupon be entitled to have and to hold the premises and property so conveyed and transferred, free and discharged from the lien and encumbrance of said first mortgage and from the claims of all other parties to this suit and those claiming under them, save only as herein expressly reserved, and save only as to such claims as may have accrued against the receiver in his operation of the road within six months prior to the entry
23 of this decree, and which are prior in right to the mortgage lien herein foreclosed, and which shall not have been presented to this court, upon intervening petition or by the receiver for allowance before the entry of the decree of confirmation and distribution herein.

VIII. The respondent, Toledo, St. Louis and Kansas City Railroad Company, shall, at the time of the execution of said deed or deeds by the special masters, as a further assurance to the purchaser or purchasers, his or their successors or assigns, execute its deed or deeds or join with said special masters in the execution of the deed or deeds to be made by them, and shall thereby convey, transfer and release to the purchaser or purchasers, his or their successors or assigns, all its right, title and interest in the property and franchises conveyed and transferred to such purchaser or purchasers by said special masters; and said Continental Trust Company of the City of New York, as trustee under said first mortgage, shall by proper deed or deeds or other instruments, transfer and release to such purchaser or purchasers all its right, title and interest under the said first mortgage, in or to the property so conveyed and transferred; and, further, the receiver in this cause shall make and deliver a good and sufficient deed or deeds, conveying and assigning to the purchaser or purchasers the right, title and interest of the receiver in or to any property vested in him or standing in his name, or to which he as such receiver, in the management or operation of

the mortgaged premises, or by use of the income or proceeds of any part thereof, or in any manner, has or shall have acquired title, or of which he shall be possessed, or to which he shall be entitled.

IX. In case the proceeds of said sale shall not be sufficient to pay, in full, the amounts hereinbefore found to be due for
24 principal and interest upon said first mortgage bonds, then the said special masters shall report to the court the amount of the deficiency or deficiencies, and the complainant, on the confirmation of said report, shall have judgment against the respondent railroad company for the amount of such deficiency, and shall have execution therefor, pursuant to the rules and practice of this court.

X. It is further ordered, adjudged and decreed, that the cross bill of said cross-complainants Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin and Ellen V. Hamlin be, and the same hereby is, dismissed on the merits for want of equity as against the complainant Continental Trust Company of the City of New York, and that said complainant, Continental Trust Company of the City of New York, recover of the said Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin and Ellen V. Hamlin, its costs in said cross-action, to be taxed, and that said complainant trust company have execution therefor.

XI. It is further ordered, adjudged and decreed that the amended intervening petition of Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotive Works, the Rhode Island National Bank, and the Signal Oil Works, Limited, be, and the same is hereby dismissed on the merits for want of equity as against the complainant Continental Trust Company of the City of New York and that the complainant Continental Trust Company of the City of New York recover from said petitioners, Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotive Works, the Rhode Island National Bank, and the Signal Oil Works, Limited, the costs of said complainant in said proceeding, to be taxed, and that said complainant have execution therefor.
25 Subject in all respects as hereinabove found and decreed, such dismissal shall be without prejudice to the right of the Contracting and Building Company of Kentucky to proceed under its petition filed October 31, 1893, and to the right of the Rhode Island Locomotive Works to proceed under the amended petition filed December 28, 1893.

XII. All questions not hereby disposed of, including the discharge of the receiver and the settlement of his accounts, are reserved for future adjudication, and any party to this cause may at any time apply to this court for further relief at the foot of this decree.

April 1, 1898.

WM. H. TAFT,
Circuit Judge.

26 December Term, A. D. 1899, to-wit, April 18, 1900.

Present: The Honorable A. C. Thompson, United States district judge, sitting by designation.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW York, Survivor of John M. Butler, Complainant,
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD Company *et al.*, Respondents. } In Equity. No. 1205.

CHARLES HAMLIN ET AL., Cross-complainants,
vs.
CONTINENTAL TRUST COMPANY OF THE CITY OF NEW York, Toledo, St. Louis and Kansas City Railroad Company, Cross-respondents. } Cross-bill.

Now, on the 17th day of April, 1900, come again the parties by their respective solicitors, and come also the purchasers, Morton S. Paton and Richard B. Hartshorne, by their counsel, and the
27 motion of the complainant, Continental Trust Company of the City of New York, that the report of Frank H. Shaffer and Merrill Moores, the special masters, filed herein on the 2d day of April, 1900, should be approved and confirmed, and that the sale of the mortgaged railroad, equipment, franchises and property of the respondent, Toledo, St. Louis and Kansas City Railroad Company, should be confirmed and made absolute, came on to be heard:

And it appearing by the report of said special masters that said special masters have fully complied with the directions of the decree dated the 1st day of April, 1898, entered in this cause, and of the decree entered in this cause, dated November 11, 1899, modifying said decree of April 1, 1898, and of the decretal order entered in this cause on January 19, 1900, and of the decree entered in this cause on said January 19, 1900, re-entering and confirming said decree dated November 11, 1899, as to the sale of said railroad, equipment, franchises and property; that said railroad, equipment, franchises and property have been duly advertised, offered for sale and sold to said purchasers; that said purchasers have made the deposit and payment required by said decrees and by the terms of sale, and that said sale ought to be confirmed:

It is therefore ordered, adjudged and decreed that the said report of said special masters be, and the same hereby is, in all things approved and confirmed, and that said sale to said Morton S. Paton and Richard B. Hartshorne, as joint tenants and not as tenants in common, as an entirety, without valuation, appraisement, redemption or extension, of all and singular the railroad, equipment, franchises and property of the respondent, Toledo, St. Louis and Kansas City Railroad Company, described in and by said decree entered

in this cause, and dated the 1st day of April, 1898, and, by said decree, adjudged to be subject to the lien of the first mortgage of said respondent railroad company, at and for the sum of
28 twelve million two hundred thousand dollars by them bid, be, and the same hereby is, in all things ratified, approved, confirmed and made absolute.

And the said purchasers having deposited with the complainant, Continental Trust Company of the City of New York, for the purpose of paying, satisfying and making good the bid of such purchasers for said mortgaged railroad, equipment, franchises and property, first mortgage bonds of said respondent, Toledo, St. Louis and Kansas City Railroad Company issued under said first mortgage of said respondent railroad company, dated June 19, 1886, to the amount at par of $8,814,000, bearing the coupon maturing June 1, 1893, and all subsequent coupons, and producing the certificate or certificates of said trust company that it so holds the same subject to the order of said special masters, it is

Ordered, adjudged and decreed, that such provision for the payment of the residue of said bid of said purchasers, is satisfactory to this court, and is hereby approved by this court.

It is further ordered, adjudged and decreed, that upon the delivery by said purchasers to said special masters of said certificate or certificates of deposit of said trust company, the special masters sign, seal, execute, acknowledge and deliver a deed or deeds of conveyance to said purchasers, as joint tenants and not as tenants in common, or to the persons or corporations to whom they may assign their rights, of all and singular the railroad, equipment, franchises and property so sold as aforesaid; that the respondent, Toledo, St. Louis and Kansas City Railroad Company, the complainant, Continental Trust Company of the City of New York, as surviving trustee under said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, and the receiver in this cause, respectively,
29 and all other parties to this cause, join in said deed or deeds of said special masters, or execute and deliver separate conveyances of the property embraced therein on demand of said purchasers, their successors or their assigns, and that, in default of such deed or deeds by any of the parties hereto, this decree shall have the force and effect of such deed or deeds, conveying all its, their or his interest in said railroad, equipment, franchises and property so sold as aforesaid; that said purchasers shall have the right to assign their interest as an entirety or in parcels, as said purchasers may determine; that, upon filing such assignments with said special masters, said special masters and said parties shall make their deed or deeds of conveyance accordingly; and that, in the event of any assignment by said purchasers of their said bid or interest, or any conveyance by them of said railroad, equipment, franchises and property, all obligations incurred by said purchasers on account of the purchase of said railroad, equipment, franchises and property, may be transferred to and assumed by such transferee or transferees, grantee or

grantees, and thereupon said purchasers shall individually be discharged from all such obligations and liability.

It is further ordered and decreed, that upon the delivery to said purchasers or to their successors or their assigns of said deed or deeds of conveyance to be made by said special masters, the grantee or grantees therein shall fully possess and be invested with said railroad, equipment, franchises and property so sold and so conveyed, as the absolute owners thereof; that on the exhibition to him of said deed or deeds the receiver of this court, who, until such exhibition thereof to him, shall continue as heretofore, the operation of the mortgaged premises, is authorized and directed, and is required, to let said grantee or grantees into possession of the premises conveyed;

30 that the receiver, or any party to this cause having possession of the same, deliver to said grantee or grantees all property embraced in said special master's deed or deeds, together with and including any property and income in the hands of the receiver at any time acquired or received by him in the management of the mortgaged premises down to the time of such delivery of possession, subject, nevertheless, as hereinafter set forth, and that said purchasers, their successors or their assigns, on receiving said conveyance or conveyances, shall be, and are hereby, subrogated to all and singular, the rights of all parties to this action with respect to the railroad, equipment, franchises and property sold as aforesaid, with the right to prosecute and defend all issues in this suit and all suits, actions and proceedings involving the same, whether in the name of any of the parties hereto, or of said receiver, or otherwise, including the right to prosecute proceedings in error or on appeal.

It is further ordered and decreed, that said first mortgage bonds and coupons deposited with the complainant Continental Trust Company of the City of New York, and forming the subject of its certificates of deposit which may be delivered to said special masters, remain on deposit with said complainant trust company to abide the further order of the court herein.

It is further ordered and decreed that, upon making, in accordance with said decree of April 1, 1898, payment of the amounts by said decree directed to be paid in priority to the first mortgage bonds and the interest thereon, any residue of the fund realized from said sale shall be applied, in accordance with said decree and as therein directed, toward the payment of the amount by said decree adjudged to be due at the date thereof, in respect of said first mortgage bonds, to wit, the sum of $12,028,500, with interest on said amount from the date of said decree to the date of payment;

31 that the distribution of the proceeds of sale and all allowances and compensation are reserved for future order, and that the delivery of said deed or deeds of conveyance and of the possession of said railroad, equipment, franchises and property, sold as aforesaid, shall be subject to the right of the court to require such further payment or payments to be made in cash on account of said purchase price bid, in order to meet claims which, under

said decree, are or may become payable out of the proceeds of sale in priority to the said amount due on said first mortgage bonds, as the court may from time to time direct, and the court reserves the right in case such purchasers, their successors or their assigns, shall fail or neglect to make any payment in cash on account of any unpaid balance of the purchase price bid within thirty days after the entry of an order requiring such payment and service of a copy of said order upon said purchasers, their successors or their assigns, to retake and resell the mortgaged railroad, equipment, franchises and property, and jurisdiction of this cause is retained for that purpose.

32 United States Circuit Court, Northern District of Ohio, Western Division.

CONTINENTAL TRUST COMPANY OF THE City of New York *et al.*
vs.
TOLEDO, ST. LOUIS AND KANSAS CITY Railroad Company *et al.*
} No. 1205. In Equity.

In the Matter of the Petition of SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company.

NORTHERN DISTRICT OF OHIO, *ss:*

I, Irvin Belford, clerk of the circuit court of the United States for said district, do hereby certify that the annexed and foregoing pages contain a full and true copy of a certain decree of foreclosure and sale entered in the said circuit court in the suit of The Continental Trust Company of the City of New York against The Toledo, St. Louis and Kansas City Railroad Company and others, on the first day of April, 1898, and a certain order of confirmation of sale entered in the said circuit court, in said cause, on the 18th day of April, 1900, as referred to in the attached and foregoing writ of certiorari issued herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court at Toledo, in said district, on this 29th day of January, A. D. 1904, and of the 128th year of the Independence of the United States of America.

[Seal of the Circuit Court, Northern Dist. of Ohio.]

IRVIN BELFORD, *Clerk.*

33 [Endorsed:] File No. 18,765. Supreme Court U. S., October term, 1903. Term No. 177. Jules S. Bache, app't, *vs.* Sam'l Hunt, as rec'r. Writ of certiorari & return. Filed February 1, 1904.

FILE COPY.

FILED
MAR 21 1904
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE, APPELLANT,

vs.

SAMUEL HUNT, AS RECEIVER, ET AL.

STIPULATION AS TO CERTAIN FACTS WHICH ARE TO BE CONSIDERED PART OF RECORD.

F. SPIEGELBERG,
Counsel for Appellant.
ADRIAN H. JOLINE,
Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10135

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE, APPELLANT,

against

SAMUEL HUNT, AS RECEIVER OF THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY, AND THE TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STIPULATION.

It is hereby stipulated between the parties as follows:

1. On May 18, 1893, Joseph S. Stout and another filed a judgment creditors' bill against the Toledo, St. Louis and Kansas City Railroad Company in the circuit court of the United States for the northern district of Ohio, western division, in which case a receiver was duly appointed. On May 19, 1893, Jules S. Bache, the appellant, recovered in

the supreme court of the State of New York, in and for the county of New York, a judgment against Sylvester H. Kneeland and the Toledo, St. Louis and Kansas City Railroad Company for $72,005.65, and thereafter said Bache brought an action in the court of common pleas of the State of Ohio in and for Lucas county on said judgment obtained in New York and recovered in said court of common pleas for Lucas county against said Toledo, St. Louis and Kansas City Railroad Company a judgment for $72,449.67, with interest from June 26, 1893.

2. On or about December 13, 1893, the Continental Trust Company of the City of New York and John M. Butler, complainants, filed their bill in the circuit court of the United States for the northern district of Ohio, western division, against the Toledo, St. Louis and Kansas City Railroad Company, Samuel R. Callaway, as receiver of said railroad company; Joseph S. Stout and Randolph F. Purdy, Ferdinand E. Canda, Charles T. Harbeck, Jules S. Bache, Oliver & Roberts Wire Company, George B. Cass, and Oliver Adams to foreclose a certain mortgage made by said railroad company to the said Continental Trust Company of the City of New York and John M. Butler, as trustees, dated June 1, 1886. On the 13th of December, 1893, the said circuit court of the United States for the northern district of Ohio, western division, duly made an order consolidating the suit of the said Stout and others and the suit of the said Continental Trust Company of the City of New York and John M. Butler under the name of "The Continental Trust Company of the City of New York and John M. Butler against Toledo, St. Louis and Kansas City Railroad Company *et al.*," and extended the receivership in the said suit of Stout to the said consolidated cause.

3. On the 24th day of February, 1894, Jules S. Bache, who was made a party defendant in said foreclosure suit as the

owner of the judgment in the said court of common pleas of Lucas county, Ohio, heretofore mentioned, entered his appearance as a defendant in said consolidated suit, and on the 5th day of April, 1894, he filed his separate answer to the bill of complaint, setting up his claim upon the said last-mentioned judgment.

4. On the 19th day of July, 1894, Jules S. Bache recovered in the supreme court of the State of New York, in and for the city and county of New York, a judgment against Sylvester H. Kneeland and the Toledo, St. Louis and Kansas City Railroad Company for $43,278.64.

5. On the 15th day of October, 1897, an order of said circuit court of the United States for the northern district of Ohio, western division, was made in said consolidated cause appointing Irvin Belford special master to give thirty days' public notice by advertisement, according to the course and practice of said court, to all creditors of the Toledo, St. Louis and Kansas City Railroad Company, requiring them, on or before a certain date in said order appointed, to file before him, under the said creditors' bill filed by Joseph S. Stout and another, full and itemized statements of their respective claims against such corporation, duly verified, and notifying all persons interested that all creditors failing to comply with said notice or to prove their claims within said time in said order limited would be excluded from any decree or distribution under said creditors' bill. In pursuance of said advertisement Jules S. Bache filed before said Irvin Belford verified statements of his claims, consisting of the two judgments obtained by him in the supreme court of the State of New York hereinbefore mentioned.

It is stipulated that the foregoing facts may be held and considered in all respects as if the same had been fully set forth in the record upon this appeal; but nothing herein

contained shall be considered a waiver by the appellant of his objection that the foregoing facts or some of them do not appear or are not referred to in the petition of Samuel Hunt, receiver, filed May 28, 1900.

Dated March 18, 1904.

ADRIAN H. JOLINE,
Of Counsel for Appellees.
F. SPIEGELBERG,
Of Counsel for Appellant.

[Endorsed:] United States Supreme Court, October term, 1903. No. 177. Jules S. Bache, appellant, against Samuel Hunt, as receiver, and another, appellees. (Original.) Stipulation.

[Endorsed:] File No. 18,765. Supreme Court U. S., October term, 1903. Term No. 177. Jules S. Bache, appellant, *vs.* Samuel Hunt, as receiver, &c., *et al.* Stipulation as to certain facts which are to be considered part of record. Filed M'ch 21, 1904.

1

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

against

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company and Toledo, St. Louis and Western Railroad Company,
Appellees.

2

STATE OF NEW YORK, }
County of New York, } ss.:

F. SPIEGELBERG, being duly sworn, says that he is one of the solicitors and of counsel for the appellant herein, and has had charge on behalf of the appellant of all the proceedings taken herein. Deponent has read the affidavit of Adrian H. Joline in support of this motion. Mr. Joline omitted to state that before the filing of the petition of the receiver Hunt, the Supreme Court of the State of New York, in an action brought by the appellant, took, through its receiver, possession of the securities in the hands of the Farmers' Loan & Trust Company, which are referred to in said affidavit. These securities had been without the jurisdiction of the United

3

4 States Circuit Courts, in which the foreclosure case was pending long before the institution of such suit, and have remained without such jurisdiction ever since. These bonds in the possession of the New York Supreme Court are the basis of the controversy of the parties hereto.

Deponent further says that Mr. Joline is in error when he states that the decree of foreclosure and the order of confirmation are a part of the record, although it appears that the court below referred to the same in its opinion. Deponent further says that in his opinion the papers desired to be included in the record are not necessary for a deci-
5 sion of the jurisdictional questions involved, and that the relation both of the receiver and the Toledo, St Louis and Western Railroad Company to the securities in question sufficiently appears from the record as it now stands.

Deponent further says that the record was made up according to his direction, and that the same is in accordance with the rules both of this court and the court below. The decree from which this appeal is taken was entered in the Circuit Court on December 4th, 1902. The same day the appellant filed his assignment of errors (Record, page 106), the 16th and 17th assignment of which bring up the action of the court below in considering mat-
6 ters outside of the record. Some of these matters are now sought to be included in the record. On December 10th, 1902, the *præcipe* for the transcript of the record to the clerk of the Circuit Court was filed, specifically mentioning the papers to be included therein and containing the following statement: "You will also please include in said transcripts "all entries of any other pleadings, proceedings "and papers on your appearance docket in the "matter of the petition of Samuel Hunt, etc., as "aforesaid, and certify to that effect" (Record, page 120).

And the Clerk's certificate (page 121), states:

"I further certify that the foregoing transcript 7
"contains all the papers which appear noted on
"the appearance docket in the above-entitled
"cause in the matter of the petition of Samuel
"Hunt, as receiver".

The transcript was filed in this Court on December 29, 1902, and the printed copies thereof were received by this deponent from the Clerk of this Court on January 12th, 1903. Messrs. Butler, Notman, Joline & Mynderse, of which firm Mr. Joline is a member, and Messrs. Brown and Geddes have acted throughout this proceeding as solicitors for the receiver or the purchaser, and had notice or ought to have taken notice of all the proceedings taken by the deponent for the purpose of perfecting this appeal to this court. If they felt aggrieved 8
by any omissions in the record they should have acted promptly and not waited for one year after the record had been in print and until almost the eve of the argument.

Deponent further says that he had nothing to do with choosing the name or title of this appeal but, as he is informed and believes, the clerk of this court entitles an appeal in accordance with the names of the parties appellant and appellee as they appear from the citation.

F. SPIEGELBERG.

9

Sworn to before me this 14th day of January, 1904.

J. MANHEIMER,
[SEAL.] Notary Public,
New York County.

10 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

against

SAMUEL HUNT, as Receiver of the Toledo, St Louis, and Kansas
11 City Railroad Company and Toledo, St. Louis and Western Railroad Company,
Appellees.

Memorandum in opposition to motion for writ of certiorari to supply diminution of the record.

It appears from the affidavit and the memorandum herein of Mr. Joline that the reasons urged in support of this motion are:

12 *First.*—The final decree of foreclosure and the order of confirmation were made a part of the record.

Second.—The decree is essential for the determination of the questions involved on this appeal for the reason that it shows that this proceeding is ancillary to the foreclosure case.

Third.—The decree is essential for the reason that section four thereof covers the claim made by the appellees.

Fourth.—That the confirmation of sale contains

a reservation as to the distribution of the proceeds of sale under foreclosure. 13

We shall briefly answer these reasons in order:

First.—The decree and order were not made a part of the record. The certificate of the Clerk is presumptive evidence of the correctness of the record and becomes conclusive unless errors are shown and pointed out.

In *Pacific Railroad Company* vs. *Missouri Pacific R. R. Co., 111 U. S., 505*, it appears that in an action brought by one Ketcham, a decree of foreclosure and sale was entered against the railroad corporation, and that subsequently the cor- 14
poration filed its bill in the same Court alleging fraud in the foreclosure suit, and praying that the decree in the Ketcham suit be set aside. On page 518, Mr. Justice BLATCHFORD, delivering the opinion of the Court, says:

> "It follows, that the record in the Ketcham
> "case was never made part of the record in
> "this case, so far as appears from the only
> "record which is before this Court, on this
> "appeal. In regard to the bill in the Ketcham
> "suit, and the decree, and the master's deed,
> "and the order approving the deed, they
> "are made a part of the bill in this suit,
> "and identified by the annexing of copies. 15
> "But the statement in the bill that the plaint-
> "iff prays liberty to refer to the files and
> "records of the Circuit Court in the Ketcham
> "suit, to show such and such things, can be
> "of no force or effect to allow either party to
> "claim, in this court, the right to produce or
> "refer to anything, as answering the descrip-
> "tion of such files and records, which it may
> "assert to be such, or as being what the Cir-
> "cuit Court considered as before it. One of
> "the assignments of error, on this appeal, is
> "that the Circuit Court considered matters
> "outside of the record, and matters not em-
> "braced in the bill. We are of the opinion
> "that *this court cannot consider anything*
> "*which is not contained in the bill and the*

16 "*exhibits which are annexed to it*, and that it "cannot look into anything otherwise pre- "sented as the files and records of the Ketcham "suit, or of any other proceedings in any "court, for the purpose of determining the "question arising on the demurrers to this "bill."

Second.—The petition and all of the proceedings taken thereon, as they appear in the transcript of record, abundantly show the existence and status of the foreclosure case, and that the petition and all the other proceedings thereon were entitled in the name of the foreclosure case. If the petition is an ancillary or
17 dependent proceeding in the foreclosure case it sufficiently appears from the record and the decree adds no strength to it.

Third.—The fifth section of the decree adjudges: "All said first mortgage bonds so issued are now "outstanding in the hands of divers persons and "corporations, who are owners and holders thereof "for value."

And the ninth section: "The principal of all "said bonds is now due and payable, and there is "due and owing in respect of said first mortgage "bonds, at the date of the entry of this decree,
18 "the principal thereof $9,000,000, and for the in- "terest thereon, the following amounts."

In the face of this conclusive adjudication the assertion is made that the bonds in controversy which are included in said provisions of the decree are assets of the insolvent railroad company and passed under the sale of foreclosure to the purchasers. If the appellees have any claim to these bonds it is by virtue of the doctrine of equitable subrogation for the reason that the receiver paid the prior liens, for the payment of which these bonds were security, out of the moneys in his possession arising from the operation of the road. The receiver

took this position in his petition in the Twentieth paragraph thereof (Record, page 13), which states:

"By the terms of said decrees of foreclosure and "sale hereinabove set forth, it is adjudged that "said first mortgage of said respondent railroad "company is a lien upon all moneys, profits and "income derived by any receiver in said causes "from the operation of said mortgaged railroad "and property."

This is an exact quotation of the essential portion of the fourth paragraph of the decree and sufficient to establish the claim of the appellees, if any they have. The inclusion of the decree, therefore, in the record on this ground to show the claim of the appellees is unnecessary.

Fourth.—The decree itself contains no reservation of the distribution of the proceeds of sale. The only questions reserved for future determination are, first: what, if any, coupons maturing prior to June 1st, 1893, are outstanding and unpaid; and, second: what, if any, other claims not adjudicated are a charge on the proceeds of sale of the mortgaged property prior in lien or equity to the mortgage debt, and the amount thereof. The order of confirmation, as far as it makes any other reservation is void and *coram non judice* as attempting to change, alter or enlarge the final decree.

Farmer's Loan & Trust Co. v. *Newman*, *127 U. S.*, *649*, *660*.
Central Trust Co. v. *Grant Locomotive Works*, *135 U. S.*, *207*, *224–5*.

Head note by Miller, J., in *Bronson* vs. *Schulten*, *104 U. S. 410*.

The petition of the receiver clearly states the relation of the parties to the securities in question, and is supplemented by the petition of the Toledo, St. Louis & Western Railroad Company and the order entered thereon (*Record, pages 71–74*). The essential provisions of the final decree other

than the one above mentioned are contained in the record on page 86.

The vital question on this appeal is whether the Circuit Court has the right to interfere with property which long before the institution of the foreclosure was without its jurisdiction and over which it never exercised or attempted to exercise any jurisdiction and which prior to the institution of this proceeding had been taken into the judicial custody of the Supreme Court of the State of New York.

The record before this court is in accordance with the rules and practice thereof, and contains all the essential facts necessary for a review of the case.

No sufficient ground for a correction of the record having been shown, it is respectfully submitted that this motion made at this late date should be denied.

F. SPIEGELBERG,
Counsel for Appellant.

FILE COPY.

FILED
FEB 26 19
JAMES H. MCKENNEY

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 177

JULES S. BACHE

Appellant

against

SAMUEL HUNT, AS RECEIVER OF THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY AND TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY

Appellees

BRIEF FOR APPELLANT.

F. SPIEGELBERG
Of Counsel for Appellant

B. H. TYRREL, PRINTER, 122-133 FULTON ST., NEW YORK.

16588

Supreme Court of the United States,

OCTOBER TERM 1903.

No. 177.

JULES S. BACHE,
Appellant.

vs.

SAMUEL HUNT, as Receiver of the Toledo, St. Louis & Kansas City Railroad Company, and TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY.

Brief for Appellant.

This is an appeal from a final decree of the United States Circuit Court for the Northern District of Ohio, entered December 4th, 1902, on the petition of the appellee receiver after the appellant's plea to the jurisdiction of the court of his person and of the subject matter of the petition had been overruled, and after the entry of an order, on appellant's failure to answer, taking the petition *pro confesso* against him. The appeal is prosecuted directly to this court upon the certificate of the Circuit Court, contained in the order allowing appeal, that the jurisdiction of said court is in issue.

Statement of Facts.

The line of railroad now belonging to the Toledo, St. Louis & Western Railroad Company, extending from Toledo, Ohio, to East St. Louis, Illinois,

was, prior to 1886, operated as a narrow-gauge railroad by the Toledo, Cincinnati & St. Louis Railroad Company. The road was made up of two divisions: one, the Toledo division, extending from Toledo to Kokomo, Indiana, and the other the St. Louis division, extending from Kokomo to East St. Louis. The Toledo division was subject to a mortgage made by the Toledo, Delphos and Burlington Railway Company; the St. Louis division to one made by the Toledo, Cincinnati & St. Louis Railroad Company.

Default having been made in the payment of interest on the bonds, actions were instituted for the foreclosure of the two divisional mortgages. (Record, page 2.) Pending these proceedings an agreement of re-organization was made under date of April 9, 1884, between certain mortgage bondholders and creditors of the Toledo, Delphos & Burlington Railway Company and of the Toledo, Cincinnati & St. Louis Railroad Company on the one hand, and James M. Quigley and others on the other hand, pursuant to which the re-organization committees of the St. Louis division bondholders and of the Toledo division bondholders were constituted, of both of which James M. Quigley was made chairman (Record, page 5, and Exhibit A attached to petition, page 14).

On December 18, 1885, James M. Quigley as chairman of said committees entered into a memorandum of agreement with Sylvester H. Kneeland for the purchase by said Kneeland of the two divisions of railroads at the foreclosure sales thereof. (Record, page 5, and Exhibit B of petition, page 25.)

Pursuant thereof on December 30, 1885, the Toledo division was sold to Kneeland under decrees entered in the Circuit Court of the United States for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court of the United States for the Northern District of Ohio, and on the same day the St. Louis Division was also sold to Kneeland under decrees entered in the Circuit

Court of the United States for the District of Indiana, the court of primary jurisdiction and in the Circuit Court of the United States for the Southern District of Illinois (Record, pages 2 and 3). Each decree found, in addition to the usual provisions, that within a prescribed time after the confirmation of the sale thereunder the purchaser should pay of the unpaid purchase money a sum sufficient, taken with the cash payment to be made at the time of the sale, to pay all costs, fees, claims, debts and taxes adjudged to be due as court and receiver's indebtedness, excepting such final decrees upon said claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession of his purchase; and upon confirmation of the sale and the payment of that part of the purchase money, which by the terms of the decree, was payable by the purchaser, the master should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property; that said deed should contain an express stipulation reserving to the court jurisdiction over the mortgaged property, with full power to re-take possession thereof upon default of the purchaser in complying with the requirements of the decree respecting the payment of the purchase money. Each decree further provided that the residue of the purchase money not required to make the payments above stated should be paid by the purchaser from time to time upon the amounts adjudged by the court to be due and payable upon court and receiver's indebtedness and to be prior and superior to the lien of the mortgage foreclosed, until the entire purchase money should be exhausted, and that any surplus after the payment of such indebtedness should be distributed *pro rata* upon the coupons and bonds of the mortgage. It was further provided that the purchaser, at the aforesaid sale, reserved the right to appeal from any order or final decree made by the court decree-

ing the payment of claims adjudged to be due as court and receiver's indebtedness and to be prior in equity to the mortgage in suit (Record, pages 3 and 4).

The sales were confirmed on February 5, 1886, and on March 10th, 1886, the form of the master's proposed deed was approved and its delivery directed, the court again reserving to itself power to retake possession of the property if the grantee failed to comply with the decrees of sales in respect to payment of the purchase money. In pursuance of said order the master's deed of the property was delivered to the purchaser, Kneeland, which deed contained a provision relating to the authority of the court to retake possession of the property in accordance with the terms of the decree (Record, page 4).

Previous to the delivery of the master's deed, and on January 23, 1886, Kneeland had entered into two agreements, one with the re-organization committee of the St. Louis Division bondholders and the other with the committee of re-organization of the Toledo Division bonhholders, of both of which committees Quigley was chairman. These two agreements are identical in substance and provide for the equipment, reconstruction and broadening into standard gauge lines of the two divisions of the railroad purchased by Kneeland on December 30, 1885 (Record, page 5). The main points of these agreements (Exhibits C and D to petition, pages 26 and 33) are as follows:

First.—Kneeland agreed to complete his purchase of the two divisions in accordance with the terms of the decrees.

Second.—Kneeland agreed to organize railroad corporations under the laws of the States of Ohio, Indiana and Illinois, capitalized at $25,000 per mile of road, and that he would convey to them severally those parts of the railway within the states of their organization.

Third.—That such corporations should be consolidated, and that the consolidated company should issue

(*a.*) Six per cent, thirty-year gold bonds to the amount of $20,000 per mile secured by a first mortgage.

(*b.*) Common stock to the amount of $25,000 per mile.

(*c.*) $5,805,000 four per cent. non-voting noncumulative preferred stock.

Fourth.—Kneeland agreed to change the gauge of the railroad to the standard gauge, to equip the road with the necessary rolling stock, to make certain other improvements.

Fifth.—That the bonds and the common stock should be deposited with two trustees, one to be selected by Kneeland and the other by the other parties to the agreements, and should be delivered by said trustees to Kneeland from time to time as the work of reconstruction and equipment progressed.

Sixth.—That $1,000,000 of the preferred stock should likewise be deposited with said two trustees to be delivered to Kneeland in compromising, adjusting and settling claims and suits then existing and pending or suits that may thereafter be brought against said lines or the consolidated company.

Seventh.—$4,805,000 of the preferred stock should be exchanged upon certain terms for the indebtedness secured by the foreclosed divisional mortgages of the two narrow-gauge roads.

Eighth.—That Kneeland should pay interest accruing on the bonds while the work of reconstructing and equipping the road was going on, but that

the net earnings of the road during that period should be applied to betterments and improvements.

In pursuance of these agreements Kneeland caused to be organized three railroad corporations under the laws of Ohio, Indiana and Illinois, respectively, with an aggregate capitalization of $12,250,000 being $25,000 per mile of road, and on the organization of said companies Kneeland entered into a contract with each of them in substantially the same terms. Each of these agreements made provision for a consolidation with the two other corporations and for the re-construction of the road by the consolidated company and for the issue of the securities by the said consolidated company as contemplated by the agreements of January 23, 1886. Each of the railroad companies delivered to Kneeland its entire capital stock and received from Kneeland that part of the railway situated within its respective state. Upon the organization of the companies these reciprocal conveyances of the stock and the line of railroad were made by each railroad company and Kneeland respectively, as contemplated in said agreements (Record, pages 5 and 6).

On June 12, 1886, these three companies entered into an agreement of consolidation forming the Toledo, St. Louis & Kansas City Railroad Company. The consolidated company by proper proceedings authorized the issue of common stock to the par amount of $12,250,000, the aggregate of the capital stock of the consolidated companies, $5,805,000 preferred stock and $9,800,000 thirty-year six per cent. first mortgage bonds, and on June 19, 1886, executed and delivered a first mortgage on its line of railroad, equipment and property to the thereinnamed trustees for the purpose of securing the payment of said bonds. Of the bonds only nine thousand were ever issued, and of the common stock $11,250,000, and all of these bonds and stock were pursuant to agreements of January 23, 1886, and

for the purposes therein specified, delivered to Isaac W. White and Robert G. Ingersoll, the trustees appointed under said two agreements. As the work of re-construction and equipment undertaken by Kneeland progressed deliveries were made by these two trustees to Kneeland from time to time (Record, pages 6 and 7.)

Sundry disputes and controversies having arisen between Kneeland and the Toledo, St. Louis & Kansas City Railroad Company, an agreement of settlement was made bearing date June 1st, 1891, to which agreement the re-organization committees of the St. Louis Division bondholders and of the Toledo Division bondholders assented. This agreement contained a clause that in case of the failure of Kneeland to perform any of the provisions of the agreement the same shall become void *ab initio* as a settlement and that all matters in dispute should then be reopened and resettled. This provision was eliminated by a supplementary agreement between the parties made June 3, 1891, to which agreement the two reorganization committees also assented in writing and the following clause was substituted, to wit: "and said agreement of June "1st, 1891, shall be and the same hereby is amended "so that it shall be absolute in its terms, and that "the only remedy of either party, for any breach "thereof, shall be by action founded upon the con- "tract, whether for damages or for specific per- "formances or otherwise, as the case may require." (Record, page 60).

At the time of the execution of these agreements of June 1st, 1891, Kneeland had not completed payment of the purchase price of the railroad purchased by him at the foreclosure sales of the Toledo and St. Louis Divisions and there were then outstanding unpaid claims amounting to $350,000 and upwards, which under the terms of the foreclosure decrees had been contested by Kneeland, and which, if established, entitled said claims to be paid out of the proceeds of said

divisions, in priority to any distribution of the proceeds of sale to the holders of the bonds secured by the mortgages foreclosed. By said agreements of June 1st, 1891, it was agreed, among other things, that the trustees under the agreement of January 23rd, 1886, after the distribution of certain securities in their hands, should deliver all the remainder of such securities to the Farmers' Loan & Trust Company of the City of New York upon the execution by said trust company of a declaration of trust to the effect that it agreed to receive and hold such securities in accordance with said trust, and that said trust company should thereupon hold the same in trust as security for the payment of all the purchase money under said foreclosure sale due from Kneeland to the extent of all claims upon the proceeds of said sale which were prior to the claims of said old first mortgage bonds of the two narrow-gauge divisional lines, and upon the further agreement to pay over and deliver to Kneeland said securities as fast as he should pay said claims against said proceeds of the foreclosure sale (Record, pages 8, 83 and 84, and Exhibit F to petition, page 46). The Farmers' Loan & Trust Company thereupon executed a declaration of trust which was assented to by Kneeland and the railroad company (Record, page 53).

Pursuant to said agreement of settlement of June 1st, 1891, the Farmers' Loan & Trust Company as trustee received in June, 1891, and June, 1893, the following securities which it has held as such until the 28th day of May, 1900, to wit:

158 first mortgage bonds of the par value of $1,000 each of the Toledo, St. Louis & Kansas City Railroad Company;

11,690 shares of the common capital stock of the par value of $100 each of said railroad;

5,000 shares of the preferred capital stock of the par value of $100 each of said railroad company (Record, page 9).

On May 18, 1893, by orders of the Circuit Courts

for the Northern District of Ohio, for the District of Indiana, and for the Southern District of Illinois, a receiver of the Toledo, St. Louis & Kansas City Railroad Company and of all its property, was appointed on bills filed in said courts by Joseph S. Stout and Randolph F. Purdy against said railroad company (Record, page 9). On June 1st, 1893, the Toledo, St. Louis & Kansas City Railroad Company defaulted in the payment of the interest on its first mortgage bonds due on said day, and thereafter on December 16th, 1893, the Continental Trust Company and John M. Butler, the substituted trustees under the first mortgage, filed bills for the foreclosure of said mortgage in the above courts, and the same receiver was appointed under these foreclosure bills and the two actions were consolidated (Record, page 10). On December 1st, 1898, the petitioner, Samuel Hunt, was appointed receiver of said railroad company.

Notwithstanding the agreement of June 1st, 1891, Kneeland failed to make payment of the unpaid residue of the purchase price of the narrow gauge railroad purchased by him at the foreclosure sale thereof, although claims were finally established in said foreclosure actions to the amount and upwards of $300,000, which were adjudged prior in lien to the mortgages foreclosed by the respective decrees under which said sales were made (Record, page 10).

On February 7th, 1898, by an order of this court entered upon the petition of the then receiver of the Toledo, St. Louis & Kansas City Railroad Company it was found that there was due in respect to the said prior claims to various holders amounts aggregating, with interest, upwards of $500,000, who were entitled to payment out of the property embraced in said first mortgage of said Toledo, St. Louis & Kansas City Railroad Company in priority to the mortgage bondholders, and the receiver was directed to take up said claims, and for that purpose to apply out of the moneys

arising from the operation of the railroad and property embraced in said first mortgage the sum of $125,000. It was further provided that for the residue of the amount necessary to take up said claims with interest, receiver's certificates should issue to the amount of $430,000, and such certificates were made a first lien upon all the property of the Toledo, St. Louis & Kansas City Railroad Company of every nature and description then in the possession of the court and paramount and superior to any lien thereon of the first mortgage of the said railroad company and to all rights and claims therein of any party to the then pending foreclosure action, and that the same should be paid out of the proceeds of the sale of the mortgaged premises, unless sooner paid, and might also be paid out of any funds arising from the operation of said mortgaged railroad and property available for that purpose (Record, page 11).

The receiver, in accordance with said order, paid the sum of $125,000 and issued receiver's certificates to the amount of $430,000, of which $400,000, together with interest on the entire issue from time to time outstanding, were paid in accordance with the order of February 7th, 1898, by the receiver for the time being of said railroad out of the moneys in his hands. The outstanding receiver's certificates, if any, were required and directed to be paid by the decree of foreclosure hereinafter mentioned out of the proceeds of sale of the property embraced in said first mortgage of the Toledo, St. Louis and Kansas City Railroad, unless sooner paid out of the funds arising from the operation of the mortgaged property (Record, pages 11 and 12). At the time when the appellant instituted the action in the New York Supreme Court, hereinafter referred to, all said liens and claims had been paid and discharged (Record, page 86).

On April 1st, 1898, a decree was entered in the United States Circuit Court for the Northern District of Ohio foreclosing said first mortgage of said

railroad and directing a sale of the mortgaged premises. Decrees of similar effect were thereupon entered in the Circuit Courts for the District of Indiana and for the Southern District of Illinois (Record, pages 12 and 86). The decree of foreclosure adjudged, among other things, the first mortgage to be a lien upon all moneys, profits and income derived by the receiver from the operation of the said mortgaged railroad and property (Record, page 13); and further adjudged that the principal of all said bonds issued by the Toledo, St. Louis and Kansas City Railroad Company was due and payable, and that there was due and owing in respect of said first mortgage bonds at the date of the entry of the decree and the principal thereof, to wit: $9,000,000 and the interest thereon, amounting in all to $12,028,500 (Record, page 86). The 158 first mortgage bonds which the Farmers' Loan and Trust Company then held in pursuance of the declaration of trust, under the agreement of June 1st, 1891, are a portion of the 9,000 bonds, the principal and interest of which were found by said decree of April 1st, 1898, to be due (Record, page 86). An appeal having been taken from the decree of April 1st, 1898, to the United States Circuit Court of Appeals for the Sixth Circuit, and the same having been affirmed by the decree of November 13, 1899, and said last-mentioned decree having been re-entered on January 19th, 1900, the mortgaged premises were on March 27th, 1900, sold to Morton S. Paton and Richard B. Hartshorne for the sum of $12,200,000. Said sale was, by orders entered in April, 1900, confirmed and made absolute. At the time of the sale there was due in respect of said first mortgage bonds and coupons of the railroad company approximately the sum of $13,500,000 (Record, pages 12, 13 and 87).

In the meantime, and ever since June, 1891, the bonds and stock which had been delivered to the Farmers' Loan and Trust Company, pursuant to

the agreement of June 1st, 1891, had remained uninterruptedly in the possession of said trust company, situated within the State of New York and the United States Courts in which the general creditor suit and the foreclosure suit were pending, had never, by any order, decree or process, exercised or sought to exercise any control over them, or appointed a receiver of them, nor had any of the receivers of the railroad company demanded possession of them or any of them, or exercised or sought to exercise any control over them or made any claim or demand for them (Paragraph 4 of Plea, Record, page 77).

On May 17, 1900, the appellant, Jules S. Bache, commenced an action in the Supreme Court of the State of New York against Sylvester H. Kneeland, the Toledo, St. Louis & Kansas City Railroad Company, and the Farmers' Loan & Trust Company by the personal service of a summons and complaint upon all the defendants for the purpose of subjecting the said bonds and stock in the hands of the Farmers' Loan & Trust Company to the lien of two judgments which said Bache recovered against Kneeland and the Toledo, St. Louis & Kansas City Railroad Company in the Supreme Court of the State of New York, on May 19, 1893, for $72,005.65, and the other on July 23, 1894, for $43,278.64 (Record, page 76, and Exhibit B to the Plea, page 82). On May 23, 1900, the plaintiff in said action then pending in the Supreme Court of the State of New York, served on the defendants notice of motion for an order appointing a receiver of all the property which had come into the possession of the Farmers' Loan & Trust Company pursuant to the agreement of June 1st, 1891, to take and hold the same pending said action, subject to the further orders of the Supreme Court of the State of New York. And upon the return day of said motion, to wit, the 28th day of May, 1900, an order was duly made by said Supreme Court granting said motion and appointing the Farmers' Loan

& Trust Company such receiver. The Farmers' Loan & Trust Company filed with the Clerk of the County of New York its consent to act as such receiver, and on the same day, to wit, the 28th day of May, 1900, turned over to itself, as such receiver, the 158 first mortgage bonds and the stock hereinbefore referred to (Record, page 77, and Exhibit C, page 89).

On or about the last mentioned day, but subsequent to the turning over of the bonds to the Farmers' Loan & Trust Company by the receiver pursuant to the order of the Supreme Court of New York (§ 5 of Plea, Record page 78), Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company, filed his petition in the United States Circuit Court for the Southern District of Ohio, praying a decree of that court that the petitioner is entitled out of said first mortgage bonds and said preferred stock and said common stock in the hands of the Farmers' Loan & Trust Company, to be reimbursed such amounts with interest thereon from the respective dates of payment thereof which by the petitioner and by his predecessors in the receivership of said Toledo, St. Louis & Kansas City Railroad Company have been paid in respect of said prior claims whether of principal or interest; that said securities towards the satisfaction thereof he delivered as a part of the mortgaged premises to the purchasers of the mortgaged premises at the said sale thereof made under said decrees of foreclosure of the first mortgage of the Toledo, St. Louis & Kansas City Railroad Company, or that such securities be sold and the proceeds thereof paid to the petitioner for payment by him to the purchasers of the mortgaged premises or to be paid to said purchasers, and for such other and further relief as may be just (Record, page 13).

The petition of the receiver is entitled in the cause of the "Continental Trust Company of the City of New Yord against the Toledo, St. Louis &

Kansas City Railroad Company and others," being the title of the causes consolidated by the order of December, 1893, hereinabove referred to, in which the foreclosure proceedings were had and the final decree of foreclosure was entered. The petition does not show any connection of the appellant Bache with any of the proceedings had in said consolidated action, in fact, it does not mention his name directly or indirectly. Nor does the petition refer to any of the proceedings had in the Supreme Court of the State of New York.

On May 29, 1900, an order was made on said petition by United States District Judge Thompson, sitting by designation at his chambers in the City of Cleveland, Ohio, ordering the Continental Trust Company, the Toledo, St. Louis & Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland and the purchasers of the mortgaged premises to answer, demur or plead to the petition, and although the order does not give any direction that the same should be served on or mailed to Jules S. Bache, a copy thereof was on May 31, 1900, mailed to Bache and received by him the following day (Record, pages 64, 79 and 91). On June 9, 1900, a similar order was made by District Judge Ricks at Toledo, Ohio, in respect to the Farmers' Loan & Trust Company, and a certified copy thereof was mailed to the said trust company (Record, pages 65, 79 and 92). Kneeland and the Farmers' Loan & Trust Company disregarded the order and have not submitted to the jurisdiction of the United States Court nor in any way consented to the exercise of the jurisdiction thereof (Record, pages 79, 80 and 102).

The purchase of Paton and Hartshorne having been assigned to James N. Wallace, the latter, on his petition, was by an order entered July 13, 1900, admitted as a party respondent and the purchasers were dismissed from the record as such purchasers (Record, pages 68 and 70). On July 28, 1900 upon the petition of the Toledo, St Louis & Western

Railroad Company showing that said company had succeeded to the rights of the purchasers at the foreclosure sale, the said company was substituted as petitioner in the place and stead of Samuel Hunt receiver (Record, page 74). Both these orders were made *ex parte*, no notice thereof having been given to any of the parties.

On July 26th, 1900, Jules S. Bache specially appeared under protest for the purpose of filing his plea to the jurisdiction of the court of his person and of the subject matter of the petition (Record, pages 76 to 81). The plea having been set for hearing before Hon. A. C. Thompson, United States District Judge for the Southern District of Ohio, for November 24th, 1900 (Record, page 100), the same was argued and submitted on said day. More than one year thereafter, on December 4th, 1901, Judge Thompson filed his opinion overruling the plea (Record, page 93), and an order to that effect was entered December 14th, 1901 (Record, page 97). Jules S. Bache, having failed to answer said petition, an order was entered April 7, 1902, ordering that said petition be taken as confessed against said Bache (Record, page 100), and on December 4th, 1902, the final decree was entered on the petition adjudging that the prayer of said petition be granted and that the Toledo, St. Louis & Western Railroad Company, as successor to the rights of Samuel Hunt as receiver, and his predecessors in office, is entitled out of the first mortgage bonds and the preferred stock and the common stock in the hands of the respondent, the Farmers' Loan & Trust Company, to be reimbursed, all said amounts with interest thereon from the respective dates of payment thereof, which by the said Samuel Hunt, as such receiver, and by his predecessors in the receivership of the Toledo, St. Louis & Kansas City Railroad Company, have been paid in respect of said prior claims; that said securities be delivered to the said Toledo, St. Louis & Western Railroad Company, and that in default of such de-

livery within thirty days of the entry of this order, the said securities shall stand cancelled and as of no further force or effect as obligations of the said Toledo, St. Louis & Kansas City Railroad Company (Record, pages 101 to 104).

From this final decree this appeal is taken to this court.

Additional Statement.

The foregoing statement of facts is based upon the record as filed in the office of the clerk of this court on December 29th, 1902. On January 18, 1904, a motion was made on the part of the appellee before this court for a writ of certiorari directed to the clerk of the United States Circuit Court for the Northern District of Ohio requiring him to transmit to this court as a part of the record, upon which this appeal is to be heard, the decree of foreclosure and sale entered in said Circuit Court in the suit of the Continental Trust Company against Toledo, St. Louis and Kansas City Railroad Company and others, on April 1st, 1898, and the order of confirmation of sale entered in said Circuit Court in said cause on April 18, 1900. The appellant duly opposed this motion and on January 25, 1904 this court granted said motion *without prejudice*. The writ of certiorari and the return thereto were filed in this court on February 1st, 1904.

As the motion for the writ was granted without prejudice, we respectfully urge our objections to the consideration of the return to the writ as a portion of the record herein on the same grounds as upon the motion.

First.—The appellees are chargeable with laches in not having moved until after the lapse of one year after the filing of the record.

Second.—The decree of foreclosure and the order of confirmation were not made a part of the record in this proceeding. The 16th and 17th assignments

of errors of appellant deal with the action of the court below in considering matters outside of the record. The præcipe for the transcript of the record to the Clerk of the Circuit Court after specifically mentioning the papers to be included therein states: "You will also please include in said tran-"script all entries of any other pleadings, proceed-"ings and papers on your appearance docket in "the matter of the petition of Samuel Hunt, etc., "as aforesaid, and certify to that effect" (Record, page 120). And the clerk's certificate states: "I "further certify that the foregoing transcript con-"tains all the papers which appear noted on the "appearance docket in the above-entitled cause in "the matter of the petition of Samuel Hunt, as "receiver" (Record, page 121).

In *Pacific Railroad* vs. *Missouri Pacific R. R. Co.*, *111 U. S.*, *505*, it appears that in an action brought by one Ketchum, a decree of foreclosure and sale was entered against the railroad corporation, and that subsequently the corporation filed its bill in the same court alleging fraud in the foreclosure suit, and praying that the decree in the Ketchum suit be set aside. On page 518, Mr. Justice BLATCHFORD, delivering the opinion of the Court, says:

The Ketchum record "is no part of the trans-"cript certified from the Circuit Court. The clerk "of that court certifies that what is before us is "'A true transcript of the record in case No. "1,677 of *Pacific Railroad*, plaintiff, against "*Missouri Pacific Railway et al.*, defendants, as "fully as the same remain on file and of record in "said case in my office.' "It follows, that the "record in the Ketchum case was never made "part of the record in this case, so far as "appears from the only record which is be-"fore this court, on this appeal. In regard to the "bill in the Ketchum suit, and the decree, and "the master's deed, and the order approving the "deed, they are made a part of the bill in this "suit, and identified by the annexing of copies. "But the statement in the bill that the plaintiff

" prays liberty to refer to the files and records of " the Circuit Court in the Ketchum suit, to show " such and such things, can be of no force or effect " to allow either party to claim, in this court, the " right to produce or refer to anything, as answer- " ing the description of such files and records, " which it may assert to be such, or as being what " the Circuit Court considered as before it. One " of the assignments of error, on this appeal, is " that the Circuit Court considered matters outside " of the record, and matters not embraced in the " bill. We are of the opinion that *this court can-* " *not consider anything which is not contained in* " *the bill and the exhibits which are annexed to it,* " and that it cannot look into anything otherwise " presented as the files and records of the Ketchum " suit, or of any other proceedings in any court, " for the purpose of determining the questions aris- " ing on the demurrers to this bill."

Third.—The record sufficiently establishes the claim of the receiver, if any he has, to the bonds in controversy. It is covered by the twentieth paragraph of the petition and contains an exact quotation from and including the essential portion of the fourth paragraph of the decree of foreclosure and sale (Return to Writ, page 7). The said twentieth paragraph of the petition reads as follows: " By the terms of said decree of foreclosure and " sale hereinabove set forth, it is adjudged that " said first mortgage of said respondent railroad " company is a lien upon all moneys, profits and " income derived by any receiver in said causes " from the operation of said mortgaged railroad " and property, and all said amounts which have " been so paid in taking up said prior claims and " decrees, have been so paid or will be paid either " out of said mortgaged premises or out of moneys " derived by the receiver from the management " and operation thereof."

Fourth.—The order of confirmation of the sale is sought to be included in the record on account of the statement therein contained " that the distrib-

"ution of the proceeds of sale and all allowances "and compensation are reserved for future "order" (Return to Writ, last paragraph of page 18). The decree of foreclosure itself contains no such reservation. The only questions therein reserved for future determination are: first, what, if any, coupons maturing prior to June 1st, 1893, are outstanding and unpaid; and, second: what, if any, other claims not adjudicated are a charge on the proceeds of sale of the mortgaged property prior in lien to the mortgage debt; third: how the surplus, if any, after making all the payments directed by the decree shall be divided (Sections 4, 5 and 6, Return to Writ, pages 12 and 13). The order of confirmation therefore so far as it makes any other reservation is void and *coram non judice* as attempting to change, alter or enlarge the final decree.

Farmer's Loan & Trust Co. vs. *Newman, 127 U. S., 649, 660;*
Central Trust Co., vs. *Grant Locomo-Works, 135 U. S. 207, 224-5:*
Bronson vs. *Schulten, 104 U. S. 110*
(*Head note by Miller, J.*)

The attempted reservation in the order of confirmation for future order of the distribution of the proceeds is all the more startling in view of the adjudication of the final decree contained in section 5 of the sixth paragraph of the final decree which orders that after the payment of some preferential claims "any residue of the fund realized from "said sale shall be applied to the payment of the "principal of said first mortgage bonds and the "interest and coupons thereon with interest from "the date of this decree to the date of payment." (Return to Writ, page 12).

This adjudication which must be deemed conclusive and which prevented the court below from making any order contrary thereto in the order of confirmation, is based upon the fifth finding of the

final decree which reads in part, "All said first "mortgage bonds so issued are now outstanding "in the hands of divers persons and cor- "porations, who are owners and holders "thereof for value." (Return to Writ page 7) and upon the ninth finding, "The principal of all said "bonds is now due and payable, and there is due "and owing in respect of said first mortgage bonds "at the date of the entry of this decree, the princi- "pal thereof $9,000,000 and for interest thereon, "the following amounts" (Return to Writ, page 8).

It seems to be unquestionable that the order of confirmation cannot make any adjudication in conflict with the provisions of the decree of foreclosure. In fact, it is decreed in said order, in the sentence just preceding the attempted reservation of the distribution of the proceeds of sale, that any residue of the fund realized from the sale after the payment of the preferential claims, shall, in accordance with the decree of April 1st, 1898, be applied toward the payment of the principal of the mortgage bonds and of the interest due thereon. If, therefore, the reservation in the order of confirmation amounts to anything, it can only refer to the distribution of the proceeds among such claims which had not been determined in the final decree, and which therein were reserved for future determination.

Assignment of Errors.

The errors assigned are set out in full on pages 106 to 111 of the Record and may be briefly summarized, viz:

(1.) The Circuit Court erred in overruling appellant's plea.

(2.) The Circuit Court had no jurisdiction of the subject-matter of the 158 bonds referred to in the petition, for the reason that they never were within

its jurisdiction, but, on the contrary, were at the time of the filing of said petition in the possession of the Supreme Court of the State of New York, which tribunal had the exclusive jurisdiction to determine all conflicting claims thereto.

(3.) The Circuit Court had no ancillary or dependent jurisdiction of the subject-matter of the petition by reason of the consolidated suit referred to in the petition after the entry of a final decree therein, and it could entertain jurisdiction, if at all, only by an original suit.

(4.) The Circuit Court had no jurisdiction to entertain the petition or grant any relief thereunder, because it appears on the face thereof that the bonds never were in the possession of the receiver or his predecessors, and that any right of such receivers to their possession, if any there was, had passed to the purchasers at the foreclosure sale prior to the filing of the petition.

5. The Circuit Court had no jurisdiction of the person of the appellant, for the reason that he was never within its jurisdiction and that no proper process was served upon him within the jurisidiction of said court or elsewhere.

6. The Circuit Court had no jurisdiction in the premises by virtue of the alleged reservation of the power of the distribution of the proceeds of sale in the order confirming the sale, for the reason that the court had no power to make such reservation after the final decree of foreclosure.

7. The Circuit Court erroneously took into consideration matters outside of the record.

8. The Circuit Court had no jurisdiction to deal with the bonds in question in the absence of the Farmers' Loan and Trust Company, which was a necessary party to the controversy.

BRIEF FOR APPELLANT.

First.

Before entering upon the discussion of the legal principles involved in this appeal, it may be well to define the status of the bonds and the relations of the parties thereto.

The nine thousand first mortgage bonds together with the common stock issued by the Toledo, St. Louis & Kansas City Railroad Company upon its consolidation, in order to give effect to the provisions of the agreement of January 23rd, 1886, were delivered to two trustees to be delivered by them from time to time to Kneeland, the contractor, as the work which he had undertaken to perform progressed. This work, to wit: the reconstruction of the narrow gauge lines and the equipment of the same, was the consideration for the issue of the bonds and the stock. The payment of the prior claims which Kneeland was obligated to pay, pursuant to the decrees of foreclosure of the narrow gauge divisional lines was not a part of the consideration for the issue of the bonds. Another fund was provided for that purpose, to wit: $1,000,000 of the preferred stock of the consolidated company (Record, page 38, 1st paragraph). At the time of the settlement agreement of June 1st, 1891, Kneeland had failed to comply with some of the obligations imposed upon him by the January 23rd, 1886, agreement, and among other things, had not discharged all of the prior claims. In accordance with the settlement agreement, after the disposition of some of the securities then in the hands of the two trustees for particularly mentioned purposes, the remainder was transferred to the Farmers' Loan & Trust Company to be held in trust as security for the payment by Kneeland of the prior liens and to be delivered by it to Kneeland as fast as he should discharge these claims (Record, page 50). Among these securities were the bonds in question. It

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therefore appears that there was no change in the title to these bonds. Before 1891 the legal title was in the two trustees, subject to the withdrawal from them by Kneeland upon his completion of the work of reconstruction and equipment, and after 1891 in the Farmers' Loan & Trust Company, for the purpose of delivering the bonds to Kneeland upon the payment by him of the prior claims. Kneeland had a qualified title from the time of the issuing of these bonds and his absolute ownership thereof was subject to certain conditions precedent.

The several agreements show that the parties thereto considered the ownership of the bonds in Kneeland, though withheld from his possession until the compliance by him with his undertakings. One of the recitals in the June 1st, 1891, agreement "reads: Whereas, the said Kneeland desires to "procure the *delivery* to him of said securities, upon "terms and conditions not precisely within the "provisions of said two agreements of January 23, "1886, and to that end desires that the consent of "the parties of the first part respectively to said "two agreements of January 23, 1886, and of the "two trustees appointed *to take custody of, and* "*to distribute the securities* under said agree-"ments, or their successors in trust, should be ob-"tained to the delivery of said securities" (Record page 47).

It is clear from the agreement of January 23rd, 1886, that the consideration for the issue of the bonded indebtedness of the railroad corporation was the promise of Kneeland to reconstruct and equip the railroad. There is no provision, and it cannot be claimed, that upon failure of Kneeland to comply with his promise, the bonds or a portion thereof should revert to the railroad company. The parties were left to their remedies under the contract, or at most Kneeland could not receive the bonds which he otherwise would have been entitled to from the trustees.

The relation, however, of the parties to the bonds

has been passed upon in the foreclosure case by the Circuit Court for the Northern District of Ohio and on appeal by the Circuit Court of Appeals, from whose opinions we make the following quotations:

Judge TAFT in writing the opinion on some phases of this case, reported in *82 Fed. Rep., 642*, says, at page 655:

"The contractor (Kneeland) became by the plan "of reorganization and the rebuilding, the owner "of much of the common stock and *of the bonds.*"

An attack having been made upon the validity of the entire issue of the bonds under Section 3290 of the Revised Statutes of Ohio, as being sold below 75c. on the dollar, Judge TAFT, disposing of this issue says, at page 659:

"This argument is that *Kneeland* received "$9,000,000 of bonds and $12,000,000 of stock for "an outlay of only $6,000,000 * * * Kneeland's "contract was to do certain work *for $9,000,000 of* "*bonds* and $12,000,000 of common stock."

The very first words of the opinion of Judge TAFT on the final hearing, reported in *86 Fed. Rep. 929* at page 937, read:

"The first question to be considered is whether *the* "*issue by the defendant company of $9,000,000* "*of bonds to S. H. Kneeland* under the contract "of January 23rd, 1886, was in violation of the "Revised Statutes of Ohio."

In discussing the value of the work done by Kneeland, Judge TAFT at page 938 puts the question at issue as follows:

"Were the bonds of the company *sold* for less "than 75 % of their par value? I have read with "care all the evidence * * * in order to de- "termine how much in money's worth the com- "pany received for the "$9,000,000 of bonds *which* "*were issued by it to Kneeland*, the contractor. "Under the contract *Kneeland received $9,000,000* "*of bonds*, $11,250,000 par value of common "stock and $1,000,000 par value preferred stock."

And he winds up his calculation of the value of the work with the words at page 939 :

"It leaves a remainder of $6,897,292 as the *con-*
"*sideration which the Company received for*
"*$9,000,000 of bonds*, or something more than
76 6/10 per cent. of par.

In the tabulated statement on page 939 the Court includes among the payments made by Kneeland $650,247 "for lien claims prior to mortgage". These lien claims include the liens which are made the basis of the claim now before the court. Judge Taft, notwithstanding the non-payment by Kneeland of the portion of this claim took the view that his obligation to pay the sum was a portion of the consideration for the issue of the bonds and that the fact whether he actually did or did not pay the sum had no bearing upon the question.

And the Circuit Court of Appeals adopted the same view. LURTON, J., writing the opinion in *90 Fed Rep., 497*, after discussing Judge Taft's method of calculation uses the following language at page 515 :

"This leaves $6,897,292, which *is the value ac-*
"*tually received by the Company for $9,000,000* or
"76 6/10 of par."

At page 518 the Court says :

"The foundation of the title of the appellant
"railroad company to the property now owned
"and possessed by it was the contract of January
"23rd, 1886, between Kneeland and the bondhold-
"ers committee. The entire issue of bonds and
"stock of the new consolidated corporation was in
"its essence, but the purchase price paid by the
"new company for the railroad in its rehabili-
"tated condition."

The Court of Appeals, however, while agreeing with the calculation of Judge Taft, was of opinion that the proper rule which should be adopted was (page 519).

"The price for which *the bonds were sold* was the "money value of the obligations entered into by "Kneeland; not the money value of the contract "as he performed it but as he was obligated to "perform."

At page 519, in discussing the June 1st, 1891, agreement, the Court says:

"By that agreement, Kneeland acknowledged "his obligation to pay some $600,000 of underlying "liens which are still unpaid. The railroad com- "pany and the bondholders committee agreed that "the trustees, Ingersoll and White *should deliver* "*to him* the bonds and stock remaining in their "hands, to be held to secure his notes executed on "the consideration before stated."

And on page 520 the court referred to the contract of January 3rd, 1886:

"The contract under which *the bonds were sold* "*to Kneeland.*"

From these quotations, it appears that the courts held that all the bonds including those now under consideration passed out of the possession of the railroad company and became the property of Kneeland.

Bache, therefore, as a judgment creditor of Kneeland had an unimpeachable right to proceed against these bonds within the jurisdiction of the New York Supreme Court.

The final decree of foreclosure and sale of April 1st, 1898, affirmed by the decree of November 13th, 1899, and the further decree of January 19th, 1900, adjudged that the principal of all the bonds issued by the Toledo, St. Louis & Kansas City Railroad Company was due and payable, that the bonds were in the hands of owners and holders thereof for value and that at the date of the entry of the decree there was due and owing the principal thereof, viz., $9,000,000 and the interest thereon, amounting in all to $12,028,500. These figures, both as to principal and interest, include the

bonds in question. The decree is conclusive upon the subject so expressly adjudicated, and as it contains no reservation as to the distribution of the proceeds of the sale, it is also conclusive on the point that such proceeds go to all the bonds as between each bond upon a plane of equality. The amount going to each bond is a pure matter of computation which requires no judicial action.

Although there is no suggestion of any amendment of the final decree in that respect contained in the record, the court below in its opinion upholds the jurisdiction of the Circuit Court on the ground that "the proceeds of sale of the mort-" gaged property have not been distributed but are " still under the control of the court. The distri-" bution thereof was expressly 'reserved for future " order' *by the decree confirming the sale*" (Record, page 96). The opinion of the court below not being a part of the record (*England* vs. *Gebhardt*, *112 U. S.*, *502*), such attempted reservation can only be considered if the return to the writ of certiorari be made a portion of the record. In such case, we respectfully refer to the remarks made in this brief on pages 18 to 20.

The theory upon which the receiver proceeds, as gathered from the petition, is found in the 20th paragraph thereof (Record, page 13), which reads as follows:

" By the terms of said decrees of foreclosure and " sale hereinabove set forth, it is adjudged that " said first mortgage of said respondent railroad is " a lien upon all moneys, profits and income de-" rived by any receiver in said causes from the " operation of said mortgaged railroad and prop-" erty, and all said amounts which have been so " paid or will be paid either out of said mortgages " premises or out of moneys derived by the receiver " from the management and operation thereof."

The claim to the bonds which the receiver by his petition asserts is based upon the doctrine of equitable subrogation to whatever rights the railroad

company had against the bonds which were placed in trust with the Farmers' Loan and Trust Co. as security for the contractor Kneeland's performance of the obligation to pay the underlying or prior claims. He having failed to discharge this duty imposed upon him both by the decree of March 10, 1886, in the foreclosure case of the narrow gauge roads and the settlement agreement of June 1st, 1891, and the receiver thereupon having discharged these liens, partially out of the funds in his hands arising from the operation of the road and partially by the issue of receiver's certificates, the moneys in his possession which were covered by the mortgage, were depleted *pro tanto*, and that therefore the funds in the possession of the Farmers' Loan & Trust Company should be applied to reimburse him for such expenditures.

We do not dispute that the receiver, for the benefit of the insolvent corporation, could have established and enforced the right of equitable subrogation to the 158 bonds, if he had acted promptly and had not waived it by inaction as well as by positive acts evincing an intention so to do. But he cannot do it now and in this proceeding.

The petitioners, evidently perceiving this, went a step further by insisting, in the court below, that as soon as the receiver had discharged the prior liens which Kneeland, pursuant to the agreement of settlement, was under obligation to pay, he (the receiver) became immediately and absolutely entitled to these bonds as *assets* of the railroad company. And this contention is made in the face of the opinions of the courts in the foreclosure case and the provisions of the final decree therein entered that *all the bonds were issued and delivered by the railroad company and are due and payable and in the hands of owners and holders thereof for value* (§ 5, Return to Writ, page 7).

But the petitioners by the act of the parties themselves are barred from urging

any such claim ; their rights and remedies are fixed by the agreement of June 3rd, 1891, amendatory of the agreement of settlement of June 1st, 1891. That clause reads as follows:

"Said agreement of June 1st, 1891, shall be and "the same hereby is amended so that it shall be "absolute in its terms, and that the only remedy "of either party, for any breach thereof, shall be "by action founded upon the contract, whether "for damages or for specific performance or other-"wise, as the case may require" (Record, pages 60 and 61).

But the claim of the receiver to these bonds is untenable on more comprehensive grounds. When the predecessor of receiver Hunt was appointed by the several United States Circuit Courts, and duly qualified, all the property of the insolvent debtor within, but no property beyond, the territorial limits of these courts passed to him. It is needless to cite authorities on the proposition that the order of appointment of a receiver has no effect on property without the jurisdiction of the appointing court, and that in the absence of his having reduced the same to possession or of instituting proceedings in the court of the situs of such property to recover the same or enforce his claims thereto, property without the jurisdiction of the appointing court is exempt from any legal authority of the receiver. These bonds had their situs in the State of New York. The receivership of Hunt and his predecessors was not extended to nor was an ancillary receiver appointed of any property of the railroad company within the State of New York. But after Bache, a citizen of the State of New York, has instituted a suit in the court of the situs of the bonds for the judicial seizure of them and their condemnation and application as the property of the defendants or either of them in such suit—the Toledo, St. Louis & Kansas City Railroad Company and Kneeland—to the satisfaction of his judgments against

them, and after a receiver has been appointed by the Supreme Court of New York, who qualified and took possession of the bonds, comes the receiver, Hunt, and institutes the present proceedings for the recovery of these bonds, which were then in the possession of the Supreme Court of the State of New York. And he does that, upon the sole ground that he acquired some shadowy right to the same by virtue of his appointment as common law receiver of the insolvent mortgagor, unaided by any statute enlarging the rights or powers of said receiver as such or his title to the property of the insolvent, and unassisted by any judicial proceeding in any court of the situs of the bonds, or in any other court, save the present proceedings in the court below, subsequent to the sequestration of said bonds by the Supreme Court of New York.

If the fund placed in trust with the Farmers' Loan and Trust Company pursuant to the June 1st, 1891, agreement had not consisted of securities issued by the insolvent railroad company, is it to be supposed for one moment that the same claims would have been advanced by the appellees? And we submit that the issues in this case should be disposed of in the same manner as if this fund had been money, or other securities or obligations issued by any other person or corporation.

Second.

It appears affirmatively from the petition that the bonds were never in the possession of the receiver, Hunt, or his predecessors and that if he had any right or title to the same, it had passed to the purchasers under the foreclosure sale prior to the filing of the petition. The sale, by which the purchasers Paton and Hart-

shorne, acquired the mortgaged premises, is made the basis of this proceeding for the reason that the same included "all the moneys, "profits and income derived by any receiver from "the operation of said mortgaged railroad." This sale took place on March 27th, 1900, and was made absolute on April 18th, 1900, while the petition was not filed until May 28th, 1900. On that date, therefore, the receiver had not the shadow of a claim concerning these bonds and it was beyond the jurisdiction of the Circuit Court to entertain his petition in that respect.

Nor can it avail the appellees anything that the Toledo, St. Louis & Western Railroad Company, as the assignee of the purchasers' bid, was substituted as petitioner in the place of the receiver. At the time when the petition was filed the said railroad company was not in existence, and the order of substitution was not made until July 28th, 1900. No notice of the application thereof was given to this appellant and such substitution was not set up by an amended or supplemental petition. This appellant having been called upon to plead to the petition of the receiver, has the right to disregard all proceedings subsequent thereto unless properly incorporated in the petition, and it was error on the part of the court below to do so and to entertain jurisdiction of the petition with the Toledo, St. Louis & Kansas City Railroad Co. as substituted petitioner.

Empire Distilling Co. v. *McNulta*, 77 *Fed. Rep.*, 700.

Third.

It is unnecessary to cite authorities on the proposition that the Circuit Courts of the United States are courts of limited, though not inferior, juris-

diction and that hence in a proceeding commenced in that court, the bill must allege the facts conferring jurisdiction. Inasmuch as the petition failed to allege the residence or citizenship of Bache while the plea affirmatively shows that Bache was a citizen and resident of the State of New York and without the jurisdiction of the United States Circuit Court for the district of Ohio, the only contention of the appellees in the court below in maintaining the jurisdiction of the Circuit Court was that irrespective of the citizenship or residence of the respondents jurisdiction attached to the proceeding as an ancillary or dependent proceeding supplementary to the original suit out of which it had arisen on the ground that the appellant Bache was a party to such original suit, and the court below, in its opinion, adopted this view (Record, page 96).

The petition, however, does not state that Bache was a party to the original suits, and, in fact, his name or his connection with the controversy is neither mentioned nor in any way referred to. The plea also is silent as to any connection of the appellant Bache with the suits referred to in the petition and it is significant that the order to plead to the petition, directed by Judge Thompson to be served by mail, does not contain any direction to mail the same to the appellant Bache, though as a matter of fact the same was mailed (Record, pages 64-65 and page 91).

A bill must point out with certainty the parties complainant and respondent clearly designating the persons named as defendants by distinct allegations and by prayer of process and a failure to do so is fatally defective.

Elmendorf vs. *De Lancey*, *Hopk. Ch.*, *555*.

Verplanck vs. *Mercantile Ins. Co.*, *2 Paige*, *438*.

Kentucky Silver Mining Co. vs. *Day*, *2 Sawy.*, *408*.

The Courts have extended this rule to hold that under Equity Rule 23 an omission in the prayer of process or subpœna of the names of some of the defendants named in the introductory part of the bill is a violation of the above rule and is a fatal defect.

Goebel vs. *American Railway Supply Co., 55 Fed. Rep., 825.*

Nor does the final decree of foreclosure state that Bache was a party to the original suit. The only reference to Bache occurs in the 11th paragraph of the decree, whereby the amended intervening petition of Bache and others is dismissed (Return to Writ, page 15).

(*b.*) Although the Farmers' Loan & Trust Company was appointed receiver of the bonds in controversy by the Supreme Court of the State of New York prior to the filing of the petition herein, and had actual possession of said bonds, this was studiously ignored by the petitioners and the court below, and no attempt was made to make such receiver party. That this was absolutely necessary in order to confer jurisdiction on the Circuit Court over the subject matter, although it could have been done only with the permission of the New York Supreme Court, admits of no debate.

Porter v. *Sabin, 149 U. S., 473.*

However, an attempt was made to bring in as a party the Farmers' Loan & Trust Company as trustee of the bonds, although it never was a party to the foreclosure or creditors' suits. But the trust company, having failed to appear and its default having been set up in the plea of this appellant as a bar to the Circuit Court's jurisdiction, the court below disposed of this objection by holding that the trust company was not a necessary party and had no interest in the bonds, notwithstanding the

allegations to the contrary that the same claimed a lien on said bonds (Record, page 88).

This court, however, has held that a stakeholder, though disclaiming any interest in, or lien, upon, the property in his possession is a necessary party to a controversy concerning the same and that the objection can be taken by any of the defendants. We quote in full the opinion of Mr. Justice BREWER in

Massachusetts & Southern Construction Co. vs. *Kane Creek Township*, *155 U. S., 283.*

"The plea to the jurisdiction should have been "sustained. The substantial object of the suit was "to obtain possession of the bonds. The Deposit "& Trust Company was the party in possession, "and, although it claimed no interest in the bonds "as against the plaintiff and its co-defendant, yet "possession could not be enforced in favor of the "plaintiff except by a decree against it. Where "the object of an action or suit is to recover the "possession of real or personal property, the one "in possession is a necessary and indispensable "(and not a formal) party. The case of *Wilson* v. "*Oswego Twp.*, *151 U. S.*, *56*, is decisive on "this point. In that case a suit was commenced "in a state court in Missouri to recover possession "of certain bonds in the custody of the Union Savings Association. There were several defendants, "among them one Montague, and an intervenor, "Oswego township, who, claiming the bonds, removed the case on the ground of diverse citizenship to the federal court. Such removal was adjudged to be erroneous, this court holding "that 'the Union Savings Association, being the "bailee or trustee of the bonds, was a necessary "and indispensable party to the relief sought by "the petition, and that defendant, being a citizen "of the same state with the plaintiff, there was no "right of removal on the part of Montague, or of

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" the intervening defendant, the Oswego township,
" on the ground that the Union Savings Association,
" was a formal, unnecessary, or nominal party.'

" Further comment is not required. The decree
" of the Circuit Court must be reversed, and the
" case remanded, with instructions to sustain the
" plea, and to dismiss the bill for want of juris-
" diction."

Fourth.

That the bonds in question were and since June 1891 (a long time prior to the institution of the general creditors' and foreclosure suits in the United States Circuit Court in which the appellee Hunt and his predecessor receivers were appointed) had continuously been in the actual possession of the Farmers' Loan & Trust Company, a New York corporation in the State of New York and outside the territorial limits of the jurisdiction of the United States Circuit Courts in which both suits were pending is undeniable. It is likewise undeniable that the appellant Bache instituted a suit in the Supreme Court of the State of New York for a judicial seizure of the bonds and the condemnation and application to the satisfaction of his joint judgments against the Toledo, St. Louis & Kansas City Railroad Company and S. H. Kneeland, and that in such suit the Supreme Court of the State of New York appointed a receiver who qualified under such appointment and took possession of said bonds and that thereafter the receiver Hunt instituted the present proceedings in the United States Circuit Court for the Northern District of Ohio, wherein he prays for a decree that these bonds be delivered over to him. The decree which was entered on his petition, among other things, orders that said bonds be thus delivered to the Toledo, St. Louis and Western Railroad Company.

The subject matter of the controversy between the appellant and the appellees is the 158 bonds, which prior to any proceedings taken by the appellees were judicially seized and held by the Supreme Court of the State of New York. Under these circumstances it was improper for the United States Circuit Court to entertain the petition and enter the decree which it did, and it acted without jurisdiction.

(*a.*) This court has uniformly held in all the cases in which there was a conflict of jurisdiction between the United States Courts and the State Courts, that *possession* of the property determined the jurisdiction and that when possession is obtained by one court subsequent to the possession of another court, the court having obtained the prior possession must retain the controversy. *Not the title to the property but the possession thereof, not the right to possession but the actual possession is decisive.*

One of the earliest cases, and one very similar to this case, is *Beaston* vs. *Farmers Bank, 12 Pet., 102*, affirming the judgment of the Court of Appeals of Maryland, the opinion of which is reported at pages 107 *et seq.* It appeared among other things that in April, 1830, a bill in equity was filed by the United States in the United States Circuit Court against the bank and receivers were appointed to take possession of the property of the bank, to dispose of the same and collect its assets. In the month of September following in an action in the state court the sheriff attached the bank's property in the hands of the garnishee of the bank. The claim having been made that the prior appointment of the receivers in the United States court action invalidated the attachment of the sheriff, the court at page 110 held that the subsequent attachment was valid for the reason that the receiver had not taken possession of the property in the hands of the garnishee.

In the leading case of *Taylor* vs. *Caryll, 20 How.*,

583, an attachment was issued from the state court and levied on a vessel which was seized thereunder. Subsequently a libel was filed against the same vessel in the federal court. The vessel was sold under the judgment of each court. This court held that as the state court first seized the vessel it could not be divested of its power over it by the subsequent proceeding of the federal court, though it was a case in admiralty, and that the purchaser at the sale under the state court judgment acquired the better right. It is said:

"The Court of Chancery does not allow the pos-
" session of its receiver, sequestrator, committee or
" custodee, to be disturbed by a party, whether
" claiming by title paramount, or under the right
" which they were appointed to protect, as their
" possession is the possession of the court."

Freeman v. *Howe*, *24 How., 450*, following *Taylor* v. *Caryll*, reiterates the doctrine that in the case of conflicting authorities under a state and federal process. in which property has been seized, the question as to which authority shall for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. The court cites with approval the opinion in *Peck* v. *Jenness*, *7 How., 624*, to the effect that "Neither can one (court)
" take the property from the custody of the other
" by replevin, or any other process; for this would
" produce a conflict extremely embarrassing to the
" administration of justice."

In *Covell* v. *Heyman*, *111 U. S., 176*, it appears that a United States marshal who had seized property under a judgment of the Circuit Court, was sued in replevin in the state court by the rightful owner thereof. This court held in conformity with *Freeman* v. *Howe* that the possession of the United States marshal prevented the state court from

exercising jurisdiction, without regard to the rightful ownership.

In *Byers* vs. *McAuley*, *149 U. S., 614*, a decedent's estate was in course of administration in the state court. Subsequently a bill in equity was filed in the United States Circuit Court by a claimant to the estate. This court held that though the United States Circuit Court could not interfere with the possession of the estate in course of administration in the state court, it could determine claims made by non-residents of the state.

At page 614 the court says:

> "It is a rule of general application that
> " where property is in the actual possession of
> " one court of competent jurisdiction, such
> " possession cannot be disturbed by process
> " out of another court. The doctrine has been
> " affirmed again and again by this court".

Moran vs. *Sturgis*, *154 U. S., 257*, was a case involving the priority of seizure of certain steamboats between the United States marshal and the state court receiver.

At page 274 the court says:

> "It is a rule of general application that
> " where property is in the actual possession of
> " one court of competent jurisdiction such pos-
> " session cannot be disturbed by process out of
> " another court. This doctrine has been re-
> " peatedly affirmed by this court".

In *Shields* v. *Coleman*, *157 U. S., 108*, a receiver in the federal court after having taken possession of the property, accepted a bond in lieu thereof and turned it back to the owner. Subsequently a receiver appointed by the state court took possession thereof, but the same was taken out of his hands by the receiver appointed in the United States Circuit Court. This was held improper. On page 178 Mr. Justice BREWER delivering the opinion of the court says: "When the court "* * * made the appointment, that appointment

"could not be questioned by another court, or the "possession of the receiver thus appointed be dis- "turbed."

In *Ex parte Chetwood, 164 U. S., 443*, the following language is used: "The doctrine is firmly "established that where the jurisdiction of a "court, and the right of a plaintiff to prosecute "his suit in it, have once attached, that right can- "not be arrested or taken away by proceedings in "another court, and that where property is ac- "tually in possession of one court of competent "jurisdiction such possession cannot be disturbed "by process out of another court of concurrent "jurisdiction" (page 460).

Two cases decided by the Court of Appeals of the State of New York are very instructive on the question of jurisdiction as pointing out the difference between the right on the part of a receiver to take possession and his actual possession. In *Walling* vs. *Miller, 108 N. Y., 173*, it appeared that in a judgment creditor's action a receiver was appointed of some of the debtor's property, who took possession thereof and subsequently sold the same. Suit having been begun against the purchaser by another judgment creditor a prior lien was asserted on the ground that prior to the appointment of the receiver the sheriff had levied upon the property and that a sale was had thereunder. The court held that the sheriff's sale was void, for the reason that the property, though levied upon by the sheriff, was not taken into his custody, and that the possession was decisive. In *Varnum* vs. *Hart, 119 N. Y., 101*, it appeared that the sheriff not alone levied upon the property, but took the same into his possession, and that after the appointment of a receiver he sold the same. The court held that the sheriff's sale was not void, and could at most be held to be irregular.

A full discussion of the conflicting jurisdiction between state and federal courts and a review of the authorities are found in the case of *Knott* vs.

Evening Post Company, 124 Fed. Rep., 342, where Judge Evans makes the following summary of the matter:

"Wherever suits are pending in two or more "courts of concurrent powers, in each of which, at "the instance of different plaintiffs, it is sought to "control or to subject to the demands of creditors "the same property, that court alone has the right "to do so which first gets the property within its "grasp by some recognized mode of judicial seiz- "ure, and that, too, without regard to the question "of which suit was first instituted. The mere pri- "ority of commencement of litigation is not, "but the priority of judicial seizure is, the "test of jurisdiction over the *res* in all cases "where property is the subject of contention. "This test is simple, direct, and practical, and "draws a line which is palpable. It is of easy "solution, and cannot be open to serious mistake. "Being established as the true test, it obviates the "need to any resort to mere theories, and leave "the court, which in fact and presumably always "properly, brought the property itself *in gremio* "*legis*, to administer or control it to the "exclusion of all other courts, and without "leaving open the possibility of unseemly "wranglings with any person who may have "been disappointed in his later efforts. Some "test must be recognized by all, and the palpable "and practical one of first judicial seizure is "not only convenient but wise." * * * "Where different individuals, acting upon the "right plainly possessed by each to choose a "forum, go into different courts to enforce differ- "ent rights against the same property, we have a "case which calls into play and operation the "principles upon which the pending motion must "be determined. It is in such cases that what is "called a 'conflict of jurisdiction' arises, and in "which the doctrine of judicial comity must have "sway. That comity, being based upon common "sense, should not be manifested in mere courteous "surrenders of what somebody else asks, but "should, as the word implies, be a recognition of "the just rights of another court, as those rights "may be ascertained upon established principles. "It does not ordinarily depend upon the question

"of which suit was first brought, nor upon priority "of service and process, for these matters may, "from the nature of the litigation, affect only the "question of jurisdiction over the person, and "which, *per se*, cannot concern litigants in other "causes in other courts. Where different plaint- "iffs lawfully choose different forums to enforce "different rights, the question of priority of ser- "vice of of process so as to give jurisdiction of the "person of the defendant would be abstract and "immaterial as to the suits of third parties, unless "property was seized; but if the same property is "seized by the process of both courts, then, as only "one of them can control it, some test must be "found for ascertaining which of them shall do so, "and it is believed that no case of this sort can be "found in the courts of the United States, at least, "in which any test was acted upon except that of "prior judicial seizure. Where the question, "therefore, is one of jurisdiction over the *res*, "and not merely over the person, its solution must "logically and necessarily depend upon the prior- "ity of custody of the *res* which both courts are "asked to control. If we have been right in sup- "posing that jurisdiction over the *res* can only be "acquired by some form of judicial seizure—some "form of procedure by which it is actually brought "within the grasp and custody of the court—then "the inquiry admits of no difficulty."

(*b.*) Even though it be assumed for the purpose of argument, that the appellee receiver had an absolute or prior right to the possession of the 158 bonds, the fact that they were in the actual possession of the state court through judicial seizure, barred the Circuit Court from entertaining jurisdiction of the receiver's petition.

The rule is laid down in *Daniel's Chancery Practice* as follows, on page * 1057:

"When any person claims to be entitled to an "estate or other property sequestered, whether by "mortgage or judgment, lease or otherwise, or has "a title paramount to the sequestration, he should "apply to the court to direct an inquiry whether "the applicant has any and what interest in the "property sequestered. This inquiry is called an "examination *pro interesse suo*."

And at page * 1743, *et seq.*, the learned author applies the same rule to the case of receivers, as follows:

"The possession either of receivers or sequestrators is not to be disturbed without leave; and the same rule will be *acted on in cases where* the receiver has been appointed erroneously or without prejudice to the rights of persons having prior charges."

In *Wiswall* vs. *Sampson*, *14 How*, *52*, the court says at pages 65 and 66:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* vs. *Smith*, *9 Ves.*, *335*, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment or to permit him to be examined *pro interesse suo* and the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests, and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the Court either for liberty to bring ejectment or to be examined *pro interesse suo;* and this though their right to the possession is clear. * * * A party therefore holding a judgment which is a prior lien upon the property, the same as a guarantee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

In *Covell* vs. *Heyman*, *supra*, on page 179 the court says:

"The point of decision in *Freeman* vs. *Howe*, "*supra*, is that, when property is taken and held "under process, mesne or final, of a court of the "United States, it is in the custody of the law and "within the exclusive jurisdiction of the court "from which the process has issued for the pur- "poses of the writ; that the possession of the "officer cannot be disturbed by process from any "state court, because to disturb that possession "would be to invade the jurisdiction of the court "by whose command it is held, and to violate the "law which that jurisdiction is appointed to ad- "minister; that any person, not a party to the "suit or judgment whose property has been wrong- "fully, but under color of process, taken and with- "held may prosecute by ancillary proceedings, in "the court whence the process issued, his remedy "for restitution of the property or its proceeds "while remaining in the control of that court, but "that all other remedies to which he may be en- "titled against officers or parties, not involving "the withdrawal of the property or its proceeds "from the custody of the officer and the juris- "diction of the court, he may pursue in any "tribunal, state or federal, having jurisdiction "over the parties and the subject matter. And *vice* "*versa* the same principle protects the possession "of the property while thus held, by process issu- "ing from state courts, against a disturbance un- "der process of the courts of the United States; "excepting, of course, those cases wherein the "latter exercise jurisdiction for the purpose of "enforcing the supremacy of the constitution and "laws of the United States."

This extract from the opinion was quoted with approval in *Byers* vs. *McAuley*, *supra*, and *Moran* vs. *Sturgis*, *supra*.

In *Gumbel* vs. *Pitkin*, *124 U. S.*, *131*, an attachment having been issued out of the state court, but before the seizure of the goods thereunder by the sheriff, the United States marshal on the following day (being Sunday), under color of process issued on that day, took possession of the property. The court held that "for the reasons growing out of "the peculiar relation between federal and state

"courts exercising co-ordinate jurisdiction over "the same territory, the Circuit Court acquired "exclusive jurisdiction to dispose of the property "brought into its custody under color of its author- "ity, although by illegal means, and to decide all "questions of conflicting rights thereto," and that the attaching creditor in the state court properly intervened in the federal court for the protection of his rights.

If, therefore, the receiver and the purchaser desired to contest the claim made by Bache against the bonds in the judicial custody of the Supreme Court of the State of New York, or if they themselves asserted any right, title to or interest in said bonds, it could only be done by intervention in the suit brought by Bache in the state court.

Krippendorf vs. *Hyde*, *110 U. S.*, *276*.

(*c.*) It may be admitted that under certain conditions the United States Circuit Court would have jurisdiction over the controversy concerning these bonds, but only if Bache or the Farmers' Loan & Trust Company had chosen that forum for the purpose of procuring the *pro rata* share due on these bonds under the decree of foreclosure. But neither the Farmers' Loan & Trust Company nor Bache has made any such claim and neither the receiver nor the purchaser has the right to anticipate such a contingency and prevent Bache from asserting his equitable lien upon these bonds before such forum as he desires. That independently of any other consideration, he could do this, is unquestionable. These bonds were never in the custody of the United States Court and therefore as this Court said in *Shields* vs. *Coleman*, *supra*, at page 199, they are

"Subject to any rightful disposition by the "owner or to seizure under process out of any "court of competent jurisdiction".

The fact that the United States Circuit Court

had jurisdiction of the foreclosure case does not give that court the exclusive right to draw to itself all questions remotely or in any way connected with the main issues. And if the contention of the appellees be upheld, that such jurisdiction attaches, even after a final judgment and the disposal of all the issues in the main case, it would amount to jurisdiction in perpetuity. Even though, which we deny, the United States Circuit Court had under its control at the time when these proceedings were instituted, jurisdiction of the assets from the sale under foreclosure, it does not follow that for that reason no other court can entertain jurisdiction of matters connected with the prior litigation as long as it does not result in any disturbance of the possession which the court has of the property.

In *Buck* vs. *Colbath*, *3 Wall.*, *334*, Mr. Justice MILLER delivering the opinion of the court, says on page 341:

"It is only while the property is in possession of "the court either actually or constructively that "the court is bound, or professes to protect that "possession from the process of other courts. "Whenever the litigation is ended, or the possession of the officer or court is discharged, other "courts are at liberty to deal with it according to "the rights of the parties before them, whether "those rights require them to take possession of "the property or not."

And on page 345:

"It is not true that a court having obtained jurisdiction of a subject matter of a suit, and of "parties before it, thereby excludes all other "courts from the right to adjudicate upon other "matters having a very close connection with those "before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character "of the jurisdiction of such cases, we must have "regard to the nature of the remedies, the character of the relief sought, and the identity of the "parties in the different suits."

To the same effect are *Yonley* vs. *Lavender*, *21 Wall.*, *276*, and *Byers* vs. *McAuley*, *supra*.

Heidritter vs. *Elizabeth Oilcloth Co.*, *112 U. S.*, *294*, holds that where the purpose of the second suit is the enforcement of a lien which is claimed to have attached to the property before the institution of the first suit or before the lien sought to be enforced therein, such proceedings may be taken in the second suit as are necessary to preserve such lien without interfering with the possession of the property.

In the very recent case of *Baer* vs. *McCullough*, *176 N. Y.*, *97*, Chief Judge PARKER announced an analogous rule as follows:

"But while Congress intended to permit the "establishment of claims against the fund in the "hands of the receivers to take place through the "ordinary local judicial machinery, it could not, of "course, tolerate an attempt on the part of such "courts to take possession of such of the fund or "property in the hands of the receivers as would "be necessary to the satisfaction of the claims. "Only one court could tbe permitted to operate "the property, marshal the assets, decree a sale "and provide for the distribution of the assets "among those entitled thereto, and hence it was "deemed necessary to establish the boundary line "beyond which state courts could not go. Such a "construction is in harmony with the decree made "by the federal court in this case. True, it pro-"vided for a method by which claims against the "fund could be ascertained, but it did not provide "that such method was exclusive, nor do we think "it could have so provided in view of the language "of the statute authorizing the commencement of "suits without its consent, for if it could take to "itself exclusive jurisdiction to establish claims "against the fund by decree made at the close of "the litigation, it could also do it at the outset of "the litigation, and in such case the authority con-"ferred by statute upon other courts to take juris-"diction of actions brought against the receivers "would be without effect, and, of course, the stat-"ute cannot thus be brushed aside.

"The decree of the federal court in this case was "made on broader lines—lines more convenient for

" the litigant and in harmony with the statute. It " assured the creditor that his claim, whether " established or not at the time of the sale of the " property, should be paid and it did not attempt " to take from him the right, plainly given him by " the statute, to select the court most convenient " to him, and it reserved to the federal court, in " the interest of all the creditors, the right to pro- " ceed at the foot of the decree to make such fur- " ther order as might be necessary to carve out of " the property or take from the fund such sum as " should be necessary to satisfy all claims estab- " lished through the proper legal machinery pro- " vided either by the state or federal government " in the event that the purchaser of the property, " the Erie Railroad Company, should fail to pay " the claims."

One of the earliest cases in which the entire subject of conflicting jurisdiction is discussed is *Wilmer* v. *Atlantic & Richmond Air Line Ry. Co., 2 Woods, 409*, which, in many of its phases, is very much like the case at bar. The principles laid down in that case, though at first adversely commented upon in some judicial opinions, have been approved by this court in the cases hereinbefore cited. We append the following extracts:

On page 425. " The question remains pure and " simple, Does the priority of commencing suit in " this court for the foreclosure and sale of the " mortgaged premises give the court constructive " possession of the property so as to nullify the " subsequent possession taken by the state court, " the respective objects of the two suits being dif- " ferent? It is too well settled to admit of con- " troversy that where two courts have concurrent " jurisdiction of a subject of controversy, the court " which first assumes jurisdiction has it exclusive " of the other. But where the objects of the suits " are different, this rule does not apply, although " the thing about or in reference to which the liti- " gation is had is the same in both cases. Thus, " an action of debt on a bond, an action of eject- " ment on the mortgage given to secure it, and a bill " in equity to foreclose the equity of redemption " may be pending at the same time unless prohibited " by some statutory regulation. The land mort-

"gaged may be seized in execution by the sheriff in "an action at law, even while the ejectment or the "bill to foreclose is pending. A bill to foreclose is "a personal proceeding, although it has reference "to a specific thing. Its object is to put an end to "an existing equity, and to procure a sale of the "mortgaged premises. Possession may be taken "in the course of proceedings, but until it is taken, "can it be said that the property is sacred from the "touch of other persons or courts? The present "case, then, is resolved to this: Had the Fulton "County Court power to appoint a receiver, and "place him in charge of the property, whilst a "bill to foreclose was pending in this court; or "was it an interference with the jurisdiction of "this court?"

After stating that though the controversy before the state court was different from that before the federal court, both had for their ultimate object the possession of the railroad in question, and that, therefore, a conflict of jurisdiction as to the thing or subject-matter had arisen, the court proceeds at page 427: "The test I think is this: Not which "action was first commenced, nor which cause of "action has priority or superiority, but "which court first acquired jurisdiction "over the property. If the Fulton County "Court had the power to take possession "when it did so, and did not invade the possession "or jurisdiction of this court, its possession will "not be interfered with by this court; the parties "must either go to that court and pray for the re- "moval of its hand, or having procured an adjudi- "cation of their rights in this court, must wait "until the action of that court has been brought "to a close, and judicial possession had ceased. "Service of process gives jurisdiction over the "person. Seizure gives jurisdiction over the prop- "erty; and until it is seized, no matter when the "suit was commenced, the court does not have "jurisdiction."

While some cases may be found which criticise the severity of the doctrine, that actual possession is the prerequisite for the exercise of exclusive jurisdiction, and favor the application of the rule

that potential or constructive possession acquired by a prior action is sufficient, yet even this view is conditioned upon the power of the court to take actual possession by virtue of its own process, and has no application to a case, as is this one, where the *res* in dispute is in a foreign sovereignty and incapable of being reduced to possession, either actually or constructively, save with the help of the foreign court. *In all the cases cited, the property was within the territorial limits of both the federal and state courts and capable of seizure by either of them.* An examination of the authorities fails to reveal one single instance where the jurisdiction of one court was maintained for the purpose of interfering with property in the judicial custody of a court beyond the territorial limits of the former.

No matter how sweeping the powers of the equity jurisdiction have been determined to be in the administration of assets under its control, it has always halted at property in the possession of a foreign court. This limitation was clearly enunciated in the case of *Borer* v. *Chapman*, *119 U. S.*, *587*, which contains an elaborate discussion of the powers of the court in cases involving administration of estates. After enumerating the wide powers of the court in such cases, it is said, on page 600:

> "*The only qualification in the application of* "*this principle is that the courts of the United* "*States, in the exercise of their jurisdiction over* "*the parties, cannot seize or control property* "*while in the custody of a court of the State.*"

Since the decision of *Booth* v. *Clark*, *17 How.*, *322*, it is settled beyond dispute that *a foreign receiver acquires no title to property until he has actually taken control thereof* by proceedings in the courts of the state of its situs.

This proceeding by the receiver Hunt of reaching out for property in charge of the New York Supreme Court without its sanction, is a flagrant

violation of one of the most firmly established principles of both the state and federal courts that one court cannot interfere with the possession of property in another court, and such unauthorized interference is a direct contempt of the New York Supreme Court.

Fifth.

In view of the nature of the foreclosure case and its status when the present proceedings were instituted by the receiver, the Circuit Court had no power or jurisdiction to entertain the same. The real controversy on the merits between the receiver and the Toledo, St. Louis & Western Railroad Company on the one hand and Bache, on the other, is which of the parties has a superior title or claim, whether equitable or legal, to the bonds. The enforcement of such right is a matter wholly foreign to and entirely disconnected with the foreclosure case or its subject matter and cannot be tacked on to such suit by the filing of the petition under the same title as such suit and made the subject of the ancillary, auxiliary or incidental jurisdiction of the Circuit Court in that case.

It is said in *Gibson, Suits in Chancery* § 776:

"To allow a third person to inject new matter "into a litigation, not germane to the issues "presented by the pleadings would be to allow in- "terminable confusion, incongruous issues, and "general multifariousness, wholly at variance with "every principle of true pleading, and tending in- "evitably to vexatious perplexity, alike to the "litigants and to the Chancellor. For these rea- "sons, no intervention should be allowed in any "case where the new matters sought to be in- "troduced are irrelevant, multifarious, incongruous "or otherwise proper for an original bill. * * * "It may be stated, as a general rule that no mat-

" ter should be allowed to be introduced into a " cause by a petition which is (1) proper matter for " an independent original bill (2) which could be " brought forward by an amended or sup- " plemental answer, or by a cross-bill on " the part of the defendant; or (3) " which, if contained in the bill, would make it " multifarious, or if set up in the answer would be " impertinent and no defense; or (4) which would " tend to create confusion, perplexity or delay " without any compensating advantage."

It seems to be clear that the receiver could not have such aid from the Circuit Court concerning these bonds as he now demands, assuming that it could at all have been granted in the foreclosure case, without an amendment of the pleadings or the filing of a supplemental bill during the pendency of the cause. Having failed to do this, he now files this petition on behalf of the purchasers at foreclosure sale, after the foreclosure suit has not only gone to a final decree, but after there has been a sale thereunder which has been confirmed by the court and made absolute. After all the issues in the main case are finally disposed of, a new and distinct litigation is sought to be started by the receiver under the guise of the foreclosure case by giving its title to his petition.

In *Smith* vs. *Woolfolk*, *115 U. S.*, *143*, the court holds that in a suit in equity brought by creditors against the administrators of a deceased debtor (Craig) for the settlement of his estate, after the entry of a decree ordering the sale of his estate and the distribution of the proceeds thereof, and after confirmation of the receiver's report, one of the complainants in the original suit (Todd) cannot file a petition in such suit praying that proceeds of certain property should be applied to the claim of some creditor other than that of one of the co-complainants (Woolfolk) who had received the same and that said co-complainant account therefore. The court says :

"We are of opinion that the decree of the Chicot "Circuit Court made on the 28th day of October, "1868, was, so far as it concerned Joseph H. Wool- "folk and Lucie D. his wife, a final decree in the "cause, and they were bound to take no notice of "the subsequent proceedings, unless they were "served with process or entered their voluntary "appearance. By that decree the rights of the "parties then before the court, as stated in the "original bill, and all the assets of the estate of "Craig actually or constructively within the juris- "diction of the court, were disposed of. * * * "Even if the decree made on the original bill was "not final, the petition filed by Todd was so radical "a departure from the case made and relief prayed "by the original bill as to be a new suit "and require service of process on the parties "made defendant thereto. It instituted a new "litigation on new and distinct issues not raised "by the original pleadings, and between parties "who were complainants in the original cause. "* * * *After a decree disposing of the issues "and in accordance with the prayer of a bill had "been made, it is not competent for one of the "parties, without a service of new procees or ap- "pearance, to institute further proceedings on "new issues or for new objects, although con- "nected with the subject-matter of the original "litigation by merely giving the new proceedings "the title of the original cause.* If his bill begins "a new litigation, the parties against whom he "seeks relief are entitled to notice thereof and "without it they will not be bound."

The principle of that case was re-affirmed in *Great Western Telegraph Co.* vs. *Purdy, 162 U. S., 329, 335.*

In Bowen v. *Christian, 16 Fed. Rep., 729,* a receiver appointed in a suit to wind up a partnership, filed a bill to set aside certain mortgages upon the partnership property as fraudulent and obtained an order for substituted service upon the attorney in fact of the mortgagees. BROWN, J., writing the opinion, says:

"In this case defendants are not parties to the original suit. They are simply lienholders of the property in the possession of this court.

This bill is clearly an original bill, since it relates to a matter not before litigated in this court by the same persons. As Mr. Justice STORY says: 'Bills not original are those which 'relate to some matter already litigated in the 'court by the same persons, and which are 'either in addition to, or in continuation of, an 'original bill or both.' Eq. Pl. § 16. The bill is undoubtedly a continuation and carrying forward to some extent, of the original suit, since, in order to fix the amount of Mr. Nichol's interest in the partnership assets, it is necessary to determine the validity of these mortgages. But none of the parties to this suit are parties to the other. The bill is no less an original one because it happens to be an outgrowth of the others."

In *Sheffield, &c., Railway Company* v. *Newman*, *77 Fed. Rep., 787*, after a foreclosure of a railroad mortgage and the sale of the property subject to the lien of receiver's certificates reserving, however, to the purchasers the right to contest the validity thereof upon a proper case being made by parties in interest, one of such certificate holders brought suit.

The Court says; at page 793:

"Appellant's contention, with regard to that "part of the property which was sold to satisfy "the Woodson certificates, raises a question which "must be decided from a standpoint somewhat dif- "ferent. To the proceedings which resulted in "that decree, the appellee was not made a party. "The decree only provided for the payment of a "part of the certificates, the contest as to the "validity of which had been previously allowed in "the original cause. The appellants urge that "although appellee was not an actual party, "he was a privy, because the proceedings on the "Woodson certificates was a continuation of an "issue in the original cause. This contention is "without force. The case to be made under "the reservation as to the Woodson certificates "was a case to be litigated between the parties in "interest, viz., the future purchasers (who were "unknown at the time the reservation was made)

" and the holders of the Woodson certificates. " The future purchasers were the only parties in " interest authorized to resist payment of those " certificates. The suit was not brought on behalf " of any other certificate holders. The proceed- " ings against the purchasers alone amounted, " therefore, to an original suit. It has been held " that where a bill does not relate to some matter " already litigated in the same court by the same " person, it is an original bill, and not ancillary to " the original suit."

Christmas v. *Gaines*, *14 Wall*, *69*, was an action by plaintiff to recover on notes held by him and a mortgage given to secure the same. The sureties in an error bond by the plaintiff having been given a lien on said note by the plaintiff, filed a bill claiming subrogation to the notes. The court held that the bill was an original one and not one auxiliary or ancillary to the action.

Krippendorf v. *Hyde*, *110 U. S.*, *276*, announces no principle in conflict to this proposition. There the court had possession of the fund, and a party claiming the fund in hostility to the plaintiff in that suit intervened for the purpose of establishing his right to the same. Here neither the bonds in question nor the distributive share of the proceeds of sale to which the owners thereof are entitled are, or have been, within the jurisdiction of the Circuit Court.

In *Coburn* vs. *Cedar Valley Land & Cattle Co.*, *138 U. S.*, *196*, a settlement of the pending suit having been set up by petition and a decree rendered thereon, Mr. Chief Justice FULLER, delivering the opinion, says at page 223:

" It is objected that the decrees in question were " improperly rendered, for want of jurisdiction to " proceed upon the petitions. Undoubtedly the " ordinary rule would have required the matter of " the settlement to be presented by a supplemental " bill or cross-bill or a bill in that nature; and " these decrees were rendered upon petition only. " But this objection was not raised until after a

"decision rendered. Appellants appeared in an-
"swer to the petition."

The fact that the petitioner is an officer of the court does not entitle him to any privilege not accorded to other suitors.

Receiver of State Bank v. *First National Bank, 34 N. J. Eq., 451.*

The appellees in the court below claimed that this proceeding could be maintained as an ancillary and dependent proceeding supplementary to the original suit and relied on the cases of *Porter* vs. *Sabin, 149 U. S., 473; Rouse* vs. *Letcher, 156 U. S., 47; Gregory* vs. *Van Ee, 160 U. S., 643,* and *White* vs. *Ewing, 159 U. S., 57.*

Porter vs. *Sabin* was an action of stockholders for an accounting and for the payment of the amount found due against the officers of the corporation, of which the state court had appointed a receiver who had taken possession of its assets. The action was brought after the state court had denied the receiver's petition for authority to bring it and the plaintiff's application for leave to make him a party.

On page 480 the court says: "The whole prop-
"erty of the corporation *within the jurisdiction*
"*of the court* which appointed the receiver, in-
"cluding all its rights of action, except so far as
"already lawfully disposed of under orders of that
"court, remains in its custody, to be adminis-
"tered and distributed by it".

In *Rouse* vs. *Letcher* the point involved was whether a decree in an intervening petition though separable from the main suit, followed the finality of the decree of the Circuit Court of Appeals in the main suit in which the jurisdiction depended entirely upon diverse citizenship. The intervention was for the recovery of damages due to the negligence of the receiver. The opinion delivered by Mr. Chief Justice FULLER reads in part as follows:

"It is plain, however, that the intervention was "entertained as belonging to that class of proceed- "ings recognized as allowable when property "sought to be charged is in *custodia legis*, and *not* "*on any other ground.* Although appellee's claim "was purely a legal one, she did not bring an ac- "tion at law, but was permitted to intervene by "petition as in the assertion of a claim upon the "property or fund being administered by the "court. It is well settled that *where property is* "*in the actual possession of a court*, this draws to "it the right to decide upon conflicting claims to "its ultimate possession and control; and that "*where assets are in the course of administration*, "all persons entitled to participate may come in, "under the jurisdiction acquired between the orig- "inal parties, by ancillary or supplementary pro- "ceedings."

The same principle is laid down in *Gregory* vs. *Van Ee*. In the case of *White* vs. *Ewing*, the question certified to this court for determination was: "Had the Circuit Court of the United States "in a general creditor's suit properly pending "therein for collection, administration and distri- "bution of the assets of an insolvent corporation, "the jurisdiction to hear and determine an ancillary "suit instituted in the same cause by its receiver "in accordance with its order, against debtors of "such corporation, so far as in said suit, the re- "ceiver claimed the right to recover from any one "debtor a sum not exceeding $2,000."

This court, having answered the question in the affirmative, says at page 39:

"The circuit court obtained jurisdiction over the "Cardiff Coal & Iron Company by the filing of the "original creditor's bill of Bosworth, a citizen of "Massachusetts, and by the appointment of a re- "ceiver, and any suit by or against such receiver, "in the course of the winding up of such corpora- "tion, *whether for the collection of its assets or* "*for the defense of its property rights*, must be "regarded as ancillary to the main suit, and as "cognizable in the circuit court, regardless either "of the citizenship of the parties or of the amount "in controversy."

And at page 40 :

" In this case, however, the court proceeds upon " its own authority *to collect the assets* of an es- " tate, with the administration of which it is " charged ; and, if the receiver in such cases ap- " pears as a party to the suit, it is only because " he represents the court in its inherent power to " wind up an estate of an insolvent corporation " over which it has by an original bill obtained " jurisdiction."

We do not deny that under certain conditions the receiver for the collection of the insolvent's assets could have brought an action against Kneeland for his breach of the agreement of June 1st, 1891, in accordance with and under the provisions of the agreement of June 3rd, 1891, nor do we deny that Bache during the pendency of the action by appropriate proceedings could have invoked the jurisdiction of the Circuit Court, but the above cases do not support the claim that the receiver by this petition can obtain from citizens of a foreign state the delivery of property without the appointing court's jurisdiction and of which a foreign court had taken charge.

Porter vs. *Sabin*, and the other cases deal with rights of actions of the insolvent *in personam*, while this proceeding is essentially one *in rem*. Furthermore, though it be for argument's sake, admitted that the mortgaged property and not the bonds is in this case the *res* which draws to the court having possession thereof all controversies in relation thereto, the cases cited do not support the contention of the appellees, for the reason :

(1.) The Circuit Court had no longer poseession of the mortgaged property, the same having been sold and the sale made absolute.

(2.) The foreclosure case being no longer *in fieri*, but on the contrary, final judgment having been entered, this proceeding is not ancillary to such suit.

(3.) This proceeding is not brought in the administration of the insolvent estate or for the collection of its assets either for its own or its creditors' benefit.

The receiver does not invoke the aid of the court for the benefit of the bondholders or any other creditors of the railroad company, but for the benefit of the purchaser. *The receiver does not seek to reduce the assets of the railroad company to his possession for distribution among the creditors or to collect the same in the administration of the insolvent estate*, but attempts after the entry of the final decree and after the claims of all creditors have been adjusted to get some benefit for persons who are not parties to the litigation and for whom he has no right to act and for whose benefit he has no right to come into court. *No claim is made that Bache is a debtor of the insolvent, nor that Bache asserts a claim tending to diminish the fund of the insolvent held for the benefit of creditors. No claim is made that the bonds be delivered to the receiver for the purpose of reducing the indebtedness of the insolvent corporation.* On the contrary, the petition itself shows that these very bonds have been decreed to be a portion of the indebtedness of the railroad company. It is an evident attempt of the purchasers through the medium of the receiver to reach for property to which they have no right whatever, either legally or morally. The substitution in the place of the receiver of the assignee of the purchasers' bid conclusively demonstrates this.

To make use of the language employed in *Gableman* vs. *Peoria, Decatur & Evansville Rwy. Co., 101 Fed. Rep., 1, 5;* affirmed in *179 U. S., 335*, though the facts therein differ from the case at bar: "The case now under con-
" sideration is not, properly speaking, ancillary
" to the case brought in the Circuit Court, in
" which the receiver was appointed. It does not
" aid or supplement the purposes of that suit.

"* * * It is not intended directly to increase, "or diminish, or in any way affect the assets in- "trusted to him, whatever may be its incidental "effect."

If the decree entered on this petition be carried out it would complete the unconscionable attempt on the part of the purchaser to cancel the bonds in question, not for the purpose of increasing the distributive share of the bondholders, but in relieving himself from paying a portion of the purchase price, to wit, the distributive share due on these bonds.

Sixth.

Assuming, although not conceding, that this proceeding is, as against the appellant Bache in the nature of one *in personam*, still the jurisdiction of the Circuit Court cannot be sustained, for it is well settled that its process cannot run or be served outside of the territorial limits of its jurisdiction.

It nowhere appears in the record or in the return to the writ of certiorari that, as stated in the opinion of the court below (Record, page 95), "Bache, as a junior encumbrancer of the railroad "and property of the Toledo, St. Louis and Kansas "City Railroad Company, was made one of the "original defendants in this suit, and entered his "appearance herein, on the 24th day of January, "1894, and afterwards set up his claim, by answer, "in the foreclosure suit, and also proved it before "the master, in the creditors' suit, which is the "same claim, upon which his proceeding, in the "State court is founded."

But even if this were so, the fact that Bache was made a party to the foreclosure proceedings for the purpose of barring or cutting off his equity of redemption in the mortgaged premises as a junior en-

cumbrancer, does not affect the question for the reason that as to him the foreclosure case had reached a final termination and that the subject matter of the receiver's petition has no relevancy to, or connection with, the subject matter of the controversy between the mortgagees and Bache in the foreclosure case.

It appears, however, from the final decree of foreclosure that Bache filed an amended intervening petition which was dismissed on the merits for want of equity as against the complainant (Return to Writ, page 15), but when this intervening petition was finally disposed of by the decree of dismissal the jurisdictional functions of the Circuit Court in relation to Bache ceased, save only as the interest of Bache as a judgment lien creditor of the mortgaged property was involved. Inasmuch, however, as it appears affirmatively from the record that the proceeds of sale under foreclosure were not sufficient to pay the first mortgage bonds and interest thereon, such interest became nugatory and extinct. But, however this may be, such interest of Bache has absolutely no relation whatever to the subject matter of the securities held by the Farmers' Loan & Trust Company which he seeks to reach as a creditor of Kneeland by virtue of his two judgments recovered in the New York Supreme Court.

The courts have always scrupulously safeguarded the rights of a party to be summoned into court only by personal service except in extraordinary cases.

Pennoyer v. *Neff*, *95 U. S., 714.*

It requires no argument to show that substituted service without voluntary appearance is unavailing to confer jurisdiction.

In *Smith* vs. *Woolfolk*, *supra*, and *Bowen* vs. *Christian*, *supra*, the order for substituted service in cases similar to this was set aside.

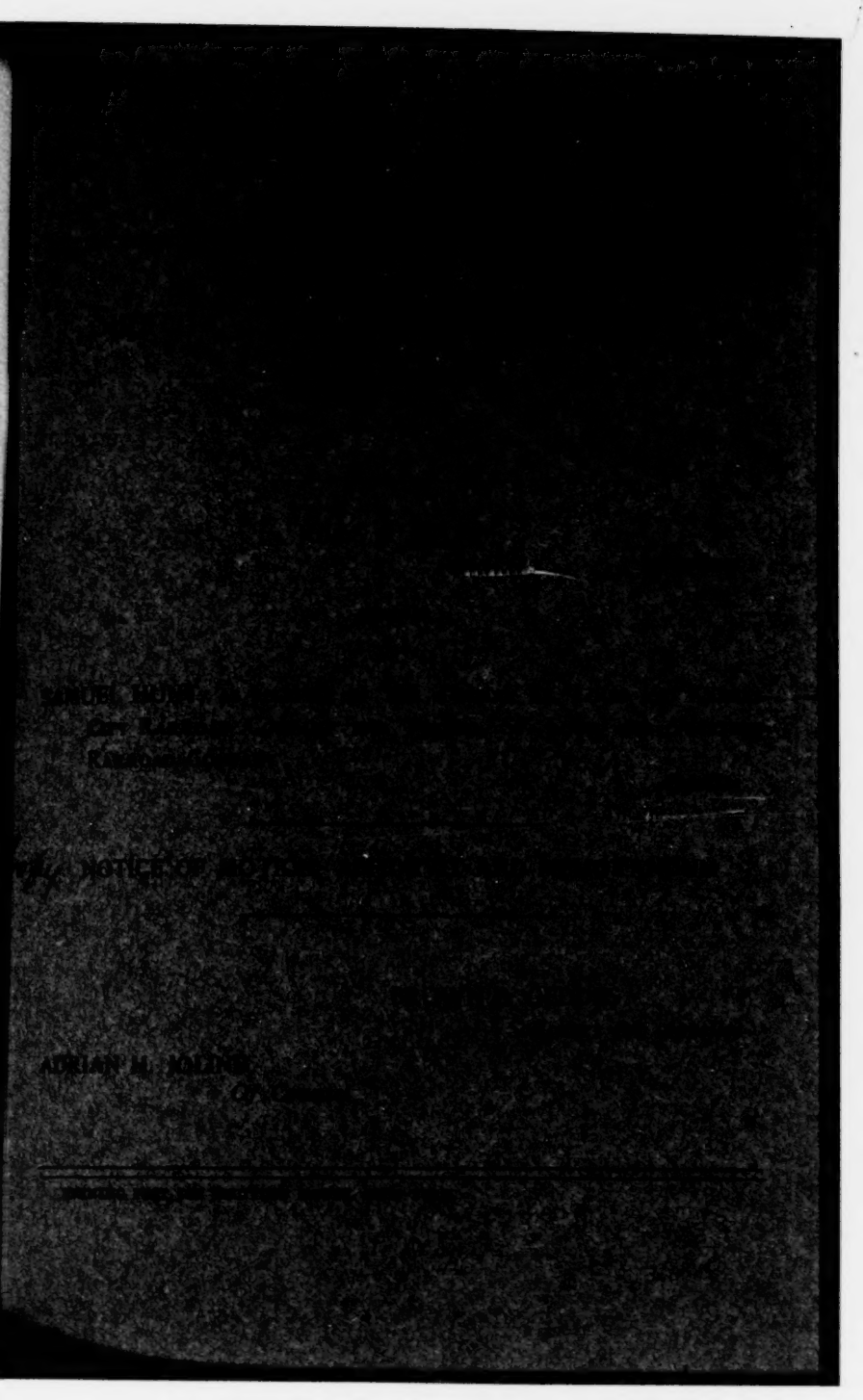
In any possible view of the case the Circuit Court

had no jurisdiction of the person of this appellant nor jurisdiction or power over the subject matter, to wit: the bonds in question, or to withdraw the same from the jurisdiction of the Supreme Court of the State of New York, or in any wise to neutralize, impair or affect injuriously to this appellant the force and effect of any judgment or decree which he may obtain in his suit pending in that court.

Seventh.

It is respectfully submitted that the decree appealed from be reversed, and that the cause be remanded to the court below with instructions to sustain the plea of this appellant and dismiss the petition.

F. SPIEGELBERG,
Counsel for Appellant.



16620

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

vs.

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company, and TOLEDO, ST. LOUIS and WESTERN RAILROAD COMPANY,
Appellee.

Please to take notice that upon the annexed affidavit of Adrian H. Joline, sworn to the 12th day of January, 1904, and the record, papers and proceedings herein, we shall move this Honorable Court, at a Term thereof, to be held at the Capitol, in the City of Washington, on the 18th day of January, 1904, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of *certiorari* directed to the Clerk of the Circuit Court of the United States for the Northern District of Ohio requiring him to transmit to this Court as a part of the record upon which the appeal herein is to be heard, a certain decree of foreclosure and sale entered in the said Circuit Court in the

suit of the Continental Trust Company of the City of New York against the Toledo, St. Louis and Kansas City Railroad Company and others, on the first day of April, 1898, and a certain order of confirmation of sale entered in the said Circuit Court, in said cause, on the 18th day of April, 1900, and for such other and further relief in the premises as may be just and appropriate.

Dated New York, January 12, 1904.

A. Joline of Counsel.

BROWN & GEDDES,
Solicitors for Appellees.

To Messrs. SPIEGELBERG & WISE,
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

vs.

SAMUEL HUNT, as Receiver of the St. Louis, Toledo and Kansas City Railroad Company, and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
Appellee.

STATE OF NEW YORK,
County of New York, } ss :

ADRIAN H. JOLINE, being duly sworn, deposes and says that he is one of the solicitors and of counsel

for the Toledo, St. Louis and Western Railroad 7
Company, the appellee herein, and is familiar with all the proceedings in the foclosure suit hereinafter referred to in which the petition of Samuel Hunt, Receiver, hereinafter mentioned, was filed.

This matter comes before the Court upon an appeal by Jules S. Bache from an order of the Circuit Court of the United States for the Northern District of Ohio, entered in the suit of the Continental Trust Company of the City of New York against the Toledo, St. Louis and Kansas City Railroad Company and others, adjudging that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of Samuel Hunt, Receiver, is entitled to certain securities, and from certain interlocutory orders, 8
including an order overruling the plea of Bache; the question arising as to the jurisdiction of the Circuit Court.

The record shows that prior to 1886, the Toledo, Cincinnati and St. Louis Railroad Company, a consolidated corporation under the laws of Ohio, Indiana and Illinois, owned and operated a narrow gauge line of railway extending from Toledo, Ohio, to East St. Louis, Illinois. The road consisted of two divisions: the Toledo Division, extending from Toledo to Kokomo, Indiana, and the St. Louis Division, extending from Kokomo to East St. Louis. Each division was subject to divisional mortgages. Default having been made in the conditions of the divisional 9
mortgages, proper actions were instituted for the foreclosure of these mortgages, and on December 30, 1885, the Toledo Division was sold to Sylvester H. Kneeland under decrees entered in the Circuit Court of the United States for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court for the Northern District of Ohio, foreclosing the first mortgage thereon made by the Toledo, Delphos and Burlington Railway Company, one of the constituent companies of said Toledo, Cincinnati and St. Louis Railroad Company, and on the same day the St.

Louis Division was also sold to Kneeland under decrees entered in the Circuit Court for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court for the Southern District of Illinois, foreclosing mortgages thereon made by the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, another of said constituent companies (*Petition, Record*, pp. 2, 3).

Under the said decrees of foreclosure and sale, and under the terms of sale, the said Kneeland, as purchaser, undertook to pay certain underlying liens, and to enforce this undertaking the decrees of forelosure reserved to the Court the power to retake and resell the mortgaged property.

The Toledo, Kansas City and St. Louis Railroad Company was then organized, and the railroad was conveyed to it by Kneeland. In consideration of the conveyance of the said railroad and of the said Kneeland's undertaking to make certain improvements thereon, the said Toledo, St. Louis and Kansas City Railroad Company agreed to issue and deliver to the said Kneeland its capital stock and bonds to an agreed amount; and under subsequent agreements certain bonds and stocks were deposited with the Farmers' Loan and Trust Company to secure the payment of the said underlying liens, and to be by it delivered to the said Kneeland from time to time as the said liens were paid and discharged.

Afterwards the said Toledo, St. Louis and Kansas City Raliroad Company became insolvent, and the Continental Trust Company as Trustee brought suit to foreclose the mortgage, securing the issue of bonds, of which those deposited with the Farmers' Loan and Trust Company were a part, and by an order entered in that suit in the Circuit Court for the Northern District of Ohio a receiver of the railroad and other property of the said Toledo, St. Louis and Kansas City Railroad Company was appointed; and the said Kneeland having failed to pay and discharge the said underly-

ing liens, the said Receiver, acting under the direc- 13
tion of the said Circuit Court and for the protection of the property, paid and discharged the said underlying liens, amounting to more than $500,000, out of the moneys and property of the railroad company in his hands.

Thereafter and on the first day of April, 1898, a decree of foreclosure and sale was entered in the said Circuit Court for the Northern District of Ohio, in the said foreclosure suit last mentioned, directing that the railroad and property of the said Toledo, St. Louis and Kansas City Railroad Company be sold.

A copy of the said decree of foreclosure is hereto annexed, marked "Exhibit A." 14

Thereafter the said railroad and other property were duly sold under the said decree, and on the 18th day of April, 1900, an order was duly entered in the foreclosure suit, confirming the said sale and directing that the mortgaged railroad and property be conveyed to the purchasers or their assigns, and reserving for urther order the distribution of the proceeds of sale.

A copy of the said order is hereto annexed, marked "Exhibit B."

On the 27th day of May, 1900, Samuel Hunt, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company, filed his petition in the said foreclosure suit, praying that the said stock and 15
securities deposited with the Farmers' Loan and Trust Compay be delivered to the petitioner, to be by him delivered as a part of the mortgaged premises to the purchasers of the mortgaged premises at the sale thereof made under the said decree of foreclosure of April 1, 1898, or that the said securities be sold, and the proceeds thereof be paid to the petitioner to be paid by him to the said purchasers, and for general relief.

Afterwards, it appearing that the rights of the purchasers had been duly assigned to the Toledo, St. Louis and Western Railroad Company,

16 the appellee herein, and that, in compliance with the order of the said Circuit Court, deeds had been made conveying the said railroad and property to that company, the Receiver was ordered to deliver possession thereof to said Toledo, St. Louis and Western Railroad Company, and on the 28th day of July, 1900, an order was duly entered in the foreclosure suit making the said Toledo, St. Louis and Western Railroad Company a party to this cause, as the successor in right and obligation of the purchasers under the said decree of April 1, 1898, and substituting it in place of the said Samuel Hunt, Receiver, as petitioner; and thereafter the said railroad and property were duly delivered to the said
17 Toledo, St. Louis and Western Railroad Company, and the said Receiver was thereafter discharged.

Thereafter Jules S. Bache filed a plea to the jurisdiction of the said Circuit Court for the Northern District of Ohio of his person, and of the subject matter of the petition of Samuel Hunt, Receiver, which plea was overruled, and on the fourth day of December, 1902, a decree was duly entered on the said Circuit Court of the United States for the Northern District of Ohio, in said foreclosure suit, granting the prayer of the said petition, of the said Samuel Hunt, as Receiver, and adjudging that the said Toledo, St. Louis and Western Railroad Company, as the successor in interest of the said Samuel
18 Hunt, as such Receiver, and his predecessors in office, was entitled, out of the said stock and securities in the hands of the said Farmers' Loan and Trust Company, to be reimbursed all sums, with interest thereon from the respective dates of payment, which the said Samuel Hunt as Receiver, and his predecessors in office had paid in respect of the said prior lien claims; that the said stock and securities be delivered to the said Toledo, St. Louis and Western Railroad Company, and that in default of such delivery the said securities stand canceled as of no further force or effect as obli-

gations of the said Toledo, St. Louis and Kansas City Railroad Company.

This appeal is taken from said last mentioned decree and from certain so-called interlocutory orders all made in said foreclosure suit.

Upon the hearing of the said plea the said decree of foreclosure, entered April 1, 1898, and the said order of confirmation, entered April 18, 1900, were before the said Circuit Court, were a part of the record, and were referred to in the opinion of Judge Thompson, who heard the argument upon the said plea, but were omitted from the transcript of the record in this Court.

In the opinion of deponent the last mentioned decree and order are a necessary part of the record upon this appeal.

Deponent, who is to argue this appeal for the appellee, did not receive the record until about three weeks ago, and makes this motion immediately upon discovering the defect in the record.

Wherefore, deponent prays that a writ of *certiorari* issue to the Clerk of the Circuit Court of the United States for the Northern District of Ohio, requiring him to transmit to this Court the said decree of foreclosure and order of confirmation, as a part of the record upon this appeal.

ADRIAN H. JOLINE.

Sworn to before me this 12th day of January, 1904.

CHAS. FLYNN,
Notary Public,
New York County.

[SEAL.]

22

Exhibit A.

DECEMBER TERM, A. D. 1897, TO WIT, APRIL 1ST, 1898.

Present—Honorable WILLIAM H. TAFT,
Circuit Judge.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, survivor of John M. Butler,

AGAINST

TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY, JOSEPH S. STOUT, RANDOLPH F. PURDY, FERDINAND E. CANDA, CHARLES T. HARBECK, JULES S. BACHE, OLIVER & ROBERTS WIRE COMPANY, GEORGE B. CASS, OLIVER ADAMS, CHARLES HAMLIN, HANNIBAL E. HAMLIN, FRANK HAMLIN, ELLEN V. HAMLIN.

In Equity. No. 1205.

23

CHARLES HAMLIN, HANNIBAL E. HAMLIN, FRANK HAMLIN and ELLEN V. HAMLIN,
Cross-complainants,

AGAINST

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK; TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY,
Cross-respondents.

Cross-bill.

24

Now, on this fifteenth day of January, 1898, this 25
cause came on to be heard upon the bill of complaint of the Continental Trust Company of the City of New York and John M. Butler, filed on the 13th day of December, 1893, and upon the answers thereto of the respective respondents, and upon the replications to said answers filed by said complainants, and upon the answer and cross-bill of Charles Hamlin and others, filed on the 15th day of October, 1895, the replication of said answer of said cross-complainants, the answer of the complainant Continental Trust Company of the City of New York to said cross-bill, and the replication thereto, and upon the proofs taken under the issues raised by said pleadings and on all 26
proceedings under said bill and cross-bill; and this cause also coming on to be heard on the amended intervening petition of Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotive Works, the Rhode Island National Bank and the Signal Oil Works, Limited, filed October 28, 1897, and the answer thereto of said Trust Company, the surviving complainant, and on the proofs taken under said amended intervening petition and said answer.

This cause having been argued by counsel, the court, being fully advised in the premises, finds and decrees as follows:

FIRST.—All the material allegations of said bill of 27
complaint of the Continental Trust Company of the City of New York and John M. Butler are true.

SECOND.—At all the times in said bill of complaint mentioned, the respondent the Toledo, St. Louis and Kansas City Railroad Company was, and it now is, a corporation duly organized and existing under and by virtue of the laws and consolidation statutes of the several States of Ohio, Indiana and Illinois, and owned and operated a line of railroad, extending from Toledo, in the State of Ohio, through

the States of Ohio, Indiana and Illinois, to the City of East St. Louis, in the County of St. Clair, in said State of Illinois.

THIRD.—In the exercise of the powers possessed by it under the laws of the said States of Ohio, Indiana and Illinois,

and in pursuance of proper corporate action to that end, said respondent Toledo, St. Louis and Kansas City Railroad Company, on or about the 19th day of June, 1886, in accordance with resolutions passed by its Board of Directors and by its stockholders, at respective meetings thereof, duly called, duly made and executed under its corporate seal, attested by the signatures of its president and secretary, its 9,800 bonds bearing date the nineteenth day of June, 1886, and by the terms of each thereof, said respondent railroad company promised to pay to the bearer, at the agency of said respondent railroad company in the City of New York, the sum of one thousand dollars in gold coin of the United States of the then present standard of weight and fineness, on the first day of June, 1916, and to pay interest on said principal sum semi-annually, at its agency in the City of New York, in like gold coin, at the rate of six per cent. per annum, from the first day of June, 1886, on the first days of June and December in each year, until the payment of said principal sum, on presentation and surrender of coupons for such interest annexed to said bonds, as said coupons should severally become due.

To secure the payment of said bonds and the coupons thereto attached, according to the tenor and effect of said bonds and coupons, said respondent railroad company, on or about said 19th day of June, 1886, in pursuance of proper resolutions of its board of directors and of its stockholders, duly executed, acknowledged and delivered to the American Loan and Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and Joseph E.

McDonald, of the City of Indianapolis, in 31
the State of Indiana, its certain indenture of mortgage or deed of trust, a copy wherof is annexed to said bill of complaint of said Continental Trust Company of the City of New York and John M. Butler, commonly known and hereinafter called the first mortgage of said respondent railroad company, and thereby conveyed to said American Loan and Trust Company and said Joseph E. McDonald, upon the trusts therein set forth the lines of railroad, equipment, franchises and property in said first mortgage and in said bill of complaint particularly described.

Said first mortgage was forthwith duly recorded
in the offices of the recorders and clerks of the 32
various counties through which said mortgaged railroad ran and in which said mortgaged property was situated.

FOURTH. – Said first mortgage is a valid and subsisting lien upon the following railroads, property and franchises, to wit, the line of railroad of said mortgagor, commencing in the City of Toledo, at or near the business centre thereof, in the County of Lucas, in the State of Ohio, and running thence through said State of Ohio, the State of Indiana and the State of Illinois, to the City of East St. Louis, in the County of St. Clair, in said State of
Illinois, a distance of about four hundred and fifty 33
miles; all other railroads and interests in railroads owned by said respondent railroad company at the date of the execution of said first mortgage, or at any time thereafter by it acquired or held in trust for it or for its benefits; all lands, roadways, tracks, superstructures, rails, sidings, turn-outs, bridges, piers, wharves, viaducts, culverts, walls, fences, ways and rights of way, depots, station houses, engine houses, car houses, freight houses, warehouses, elevators, docks, buildings, repair shops, machines shops, depot grounds and lands, sidings, all buildings, all structures, all erections

and all improvements owned by said respondent railroad company, or at the date of the execution of said first mortgage, or at any time thereafter by it acquired or held in trust for it or for its benefit; all leases and leasehold interests, contracts, choses in action, including bills receivable, traffic balances and claims of every character, and all books of account or of record and all minute books, documents and papers owned by said respondent railroad company at the date of the execution of said first mortgage or which it has since at any time acquired; all easements and privileges, including all rights of way granted by cities and towns through and along streets, squares, avenues, alleys, and public grounds, and all terminal facilities property, rights and structures of every description held or owned by said railroad company at the date of the execution of said first mortgage or to which it was then entitled, or which it has since acquired, or to which it has since become entitled, or held in trust for it, or for its benefit; including all terminal facilities, all property and privileges of every kind, and nature, and all rights of way and franchises that belonged to the Toledo, Delphos and Burlington Railroad Company, and to the companies that consolidated with the said Toledo, Delphos and Burlington Railroad Company, and all the property, rights of way, terminal facilities and privileges that belonged to the Toledo, Cincinnati and St. Louis Railroad Company, including all companies that by consolidation formed said last mentioned com pany in the said line of railroad running from Toledo, Ohio, to East St. Louis, Illinois, and all rights and privileges thereunto appertaining; and all property, terminal facilities, rights and privilegesof every kind and nature that belonged to the Toledo, Charleston and St. Louis Railroad Company, of Illinois; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to the Bluffton, Kokomo and South-Western Railroad Company, of Indiana; and all property, terminal

facilities, rights and privileges of every kind and 37
nature that belonged to The Toledo, Dupont and Western Railway Company, of Ohio; and all property, terminal facilities, rights and privileges of every kind and nature that belonged to and became vested in Sylvester H. Kneeland, the purchaser thereof, at judicial sale, on the thirtieth day of December, A. D. 1885, at the City of Indianapolis, Indiana; all locomotives, tenders, passenger cars, baggage cars, freight cars and other cars, and all other rolling stock and equipment of every character and description, and all interests in rolling stock and equipment, at the date of the execution of said first mortgage owned or possessed by said Toledo, St. Louis and Kansas City Railroad Company, or 38
held in trust for it or for its benefit, or which it, at any time or times, since, has acquired, or to which it has become entitled, or which may have been or may be held in trust for it or for its benefit; all machinery, tools and implements, rails, fastenings and spikes, materials and supplies owned by said railroad company at the date of the execution of said first mortgage, or by it at any time thereafter acquired; all rights, privileges and franchises which said Toledo, St. Louis and Kansas City Railroad Company at the date of the execution of said first mortgage held, possessed, or was entitled to, and also all rights, privileges and franchises which said railroad company has acquired or be- 39
come possessed of or entitled to, for, or in respect of, or for the uses or purposes of its said lines of railroad or the operation or maintenance of the same, or any part thereof, and all other property, rights to property or interests in property of whatever description owned by the respondent railroad company at the date of the execution of its said first mortgage or thereafter at any time by it acquired, or held in trust for it for its benefit, in extension of, or appurtenant, or incidental to the railroad and property above described, or described in and covered by said first mortgage; and also all materials and

supplies, all equipment and rolling stock and all interests therein, and all other property, real, personal and mixed, and interests in property, and all choses in action, at any time prior to the delivery to the purchasers of the property sold under this decree acquired by any receiver in this cause, or becoming vested in any receiver in this cause, or held in trust for him or for his benefit, and all moneys, profits and income derived, or at any time hereafter to be derived, by any receiver in this cause from the operation of the property herein adjudged to be subject to said first mortgage.

FIFTH.—Thereafter, and on and subsequent to said 19th day of June, 1886, said respondent Railroad Company issued and delivered its said first mortgage bonds to the amount of $9,000,000, with the coupons thereto attached, and duly certified by said American Loan and Trust Company, one of said trustees under said first mortgage securing the same. All said first mortgage bonds so issued are now outstanding in the hands of divers persons and corporations, who are owners and holders thereof for value.

SIXTH.—Said Joseph E. McDonald, one of the trustees named in said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, died after the execution and delivery of said first mortgage, and said American Loan and Trust Company, the other trustee named in said first mortgage, became insolvent after the execution and delivery thereof, and thereafter, in pursuance of the laws of the State of New York, was dissolved.

Under and in pursuance of the provisions of said first mortgage, the complainant Continental Trust Company of the City of New York, a corporation organized and existing under the laws of the State of New York, and the complainant John M. Butler had, prior to the time of filing their said bill, been duly appointed trustees

under said first mortgage and had respectively accepted said trust, and were, at the time of filing their said bill, the trustees under said first mortgage, and vested with all the estates, trusts, powers and duties of the original trustees under said first mortgage. Said Butler has since died and said Trust Company is now sole trustee under said mortgage. 43

SEVENTH.—On or about the 18th day of May, 1893, the respondents, Joseph S. Stout and Randolph F. Purdy, severally of the City, County and State of New York, and citizens of said State of New York, filed their bill in this court against said Toledo, St. Louis and Kansas City Railroad Company, alleging its insolvency and praying for 44
the appointment of receivers of its property. Thereupon, and on or about said day, by order of this Court, Samuel R. Callaway was appointed Receiver of said Toledo, St. Louis and Kansas City Railroad Company, and all its property wherever situated, and was thereby authorized, empowered and instructed, among other things, to enter upon and take possession of all such property, and to manage, control and operate the same; thereafter in an action of similar character, instituted in the Circuit Court of the United States for the District of Indiana by said complainants against said respondent, a similar order was made by said Court, and thereafter, in an action of similar character, insti- 45
tuted in the Circuit Court of the United States for the Southern District of Illinois by said complainant against said respondent, a similar order was made by said court. Said Samuel R. Callaway, appointed receiver as aforesaid, thereafter, and on or about the 22d day of May, 1893, duly qualified as such receiver and as such receiver entered upon and took possession of the railroad and property of said respondent Toledo, St. Louis and Kansas City Railroad Company, being the same property embraced in said first mortgage of said railroad company, and used and operated the same; and said mortgaged

46 railroad and property was, at the time of the filing of their bill of complaint by said Continental Trust Company of the City of New York and John M. Butler, operated by the said Samuel R. Callaway, as receiver as aforesaid, and was in the possession of said Circuit Court of the United States for the Northern District of Ohio, for the District of Indiana and for the Southern District of Illinois.

EIGHTH.—Said Toledo, St. Louis and Kansas City Railroad Company failed to pay the interest on its said bonds secured by its said first mortgage, which accrued and became due and payable on the first day of June, 1893, and the coupons for such interest
47 which matured on said day, although payment of said interest and of said coupons was duly demanded as said interest became due and said coupons matured.

Said respondent railroad company also failed to pay the installment of interest on its first mortgage bonds secured by said first mortgage, which became due and payable on the 1st day of December, 1893. Default in the payment of said interest maturing June 1, 1893, in respect of all said bonds, continued for the space of more than six months, and on about December 4, 1893, in pursuance of the powers conferred by said mortgage, the holders of one-half part of said bonds outstanding,
48 elected and declared the whole of said first mortgage bonds to be due and payable.

NINTH. The principal of all said bonds is now due and payable, and there is due and owing in respect of said first mortgage bonds, at the date of the entry of this decree, the principal thereof, $9,000,000, and for the interest thereon, the following amounts:

Interest maturing June 1, 1893,.....	$270,000
Interest thereon to the date of this decree.....	78,300
Interest maturing December 1, 1893,..	270,000

Interest thereon to the date of this decree	$70,200
Interest on said principal sum from December 1, 1893, to the date of this decree	2,340,000
Amounting in the aggregate to the sum of	$12,028,500

TENTH.—Said line of railroad covered by said first mortgage constitutes and forms one railroad system, and with all said equipment, franchises and appurtenances has hitherto been owned and operated as an entirety, and it is for the interest of the mortgagor and its creditors and of all parties that it should be sold as an entirety. The value of it in portions and sections is and will be much less than its value as a whole, and said mortgaged premises are so situated that the same cannot be sold in separate parcels without great and irreparable loss and sacrifice.

It is therefore considered, ordered and decreed as follows:

I.—Said first mortgage of the respondent railroad company is a valid lien upon the railroad equipment and other property and franchises described therein as aforesaid, and as hereinabove found and decreed, to secure said bonds and coupons issued thereunder, and the amount hereinabove found and decreed to be due thereon, to wit, said sum of $12,028,500, with interest from the date of this decree.

II.—The respondent, the Toledo, St. Louis and Kansas City Railroad Company do pay or cause to be paid within sixty days after the entry of this decree, to the complainant, Continental Trust Company, of the City of New York, for the use and benefit of the holders of said outstanding first mortgage bonds and coupons, the

amount hereinbefore found to be due in respect thereof, namely the sum of twelve million and twenty-eight thousand five hundred dollars ($12,028,500) with interest thereon from the date of this decree to the date of payment, and, in addition thereto, do pay into this Court, such sums of money as may be required by the Court in order to pay and satisfy all costs and expenses of this action, including the payment of all outstanding obligations of the Receiver in this cause, the proper compensation of the Receiver in this cause, and all expenses of such receivership and also such expenses and compensation of the trustee and its counsel as may be approved and allowed by the Court. If such payment shall be made, any of the parties hereto may apply to this Court for such further directions as may be just and equitable.

III.—In default of such payment by the respondent railroad company, or some one claiming under it, or by any one for its account, within the time directed as aforesaid, the railroad, equipment, franchises and property herein, adjudged to be subject to said first mortgage and hereinabove described, shall be sold as an entirety, in one lot or parcel, as hereinafter directed, and all the right, title, estate, interest and equity of redemption of said respondent railroad company and of the complainant, Continental Trust Company, of the City of New York, as trustee under said first mortgage, and of all other parties to this action and of all persons claiming under them or any of them of, in or to said property and every part and parcel thereof, shall be forever barred and foreclosed.

IV.—Such sale shall be made without valuation, appraisement, redemption or extension, and shall be made by and under the direction of Hiram D. Peck, of Cincinnati, and William A. Van Buren, of Indianapolis, who are hereby appointed Special Masters for that purpose, and who are directed to

make and conduct said sale, and to execute a deed or deeds of conveyance of the property sold, to the purchaser or purchasers thereof, upon an order confirming such sale and upon payment or settlement of the purchase price bid as hereinafter provided. Said sale shall be made at public auction to the highest bidder, at the terminal freight station of the respondent railroad company on Erie street in the City of Toledo, in the State of Ohio, on the property to be sold, on a day and at an hour to be fixed by said Special Masters, at the request of the solicitors for the complainant or upon further order of the Court, and notice of the time, place and terms of said sale, describing briefly the property to be sold and referring to this decree, shall be published at least once a week for six successive weeks preceding the date of such sale, in at least one newspaper in each of the following places, to wit, the City of Toledo in the State of Ohio, the City of Frankfort in the State of Indiana, the City of East St. Louis in the State of Illinois, and the City of New York in the State of New York. The Special Masters may, at the request of the complainant's solicitors, adjourn or postpone said sale and may, without further notice, proceed with the sale on any day to which the same may thus have been adjourned, or they may give such further notice of sale in addition to the notice above described or of any adjournment thereof, as the complainant's solicitors may request. 55 56 57

V.—The Special Masters shall receive no bid from any one offering to bid who shall not first deposit with him, as a pledge that he will make good his bid in case of its acceptance, the sum of twenty-five thousand dollars ($25,000) in a certified check on some national bank or incorporated trust company made payable to the order of the Clerk of this Court. The deposit so received from any unsuccessful bidder shall be returned to him when the property shall be struck down. The

deposit so received from any successful bidder shall be at once deposited in the registry of this Court and shall be applied on account of the purchase price of the property. The Special Masters shall accept no bid for said mortgaged property less than the sum of $7,500,000 for the entire road and for the Ohio part thereof an amount proportioned to said sum on a mileage basis, and unless such sum shall be bid, the Special Masters shall adjourn the sale and apply to the Court for further instructions. Upon the acceptance of any bid, the purchaser shall forthwith pay to the Special Masters the sum of $75,000 in a certified check on any national bank or any trust company payable to the order of the Clerk of this Court. Any cash or check which may have previously been deposited by the successful bidder as a pledge that he will make good his bid shall be received on account of the amount so payable by him on the acceptance of his bid. All sums of money received by the Special Masters on any accepted bid shall be forthwith deposited in the registry of the Court. In case any bidder shall fail to make good his bid upon its acceptance by the Special Masters, or shall fail after such acceptance to comply with any order of the Court relating to the payment thereof or the consummation of the purchase, then the sums deposited by such purchaser or purchasers as hereinbefore provided shall be forfeited as a penalty for such failure, and shall be applied to the payment of the expenses of the resale, and toward making good any deficiency or loss in case the property shall be sold at a less price on such resale. If such sale shall not be confirmed by the Court, such deposit shall be returned to the bidder. The purchaser shall, on the confirmation of the sale by the Court, make such further payment or payments in cash on account of the purchase price, as the Court may from time to time direct. So much of the purchase price as may not be required by the Court to be paid in cash may either be paid in cash or the purchaser may satisfy

and make good such residue of his bid in whole or 61
in part by turning in to be canceled or credited, as hereinafter provided, the first mortgage bonds and coupons to be paid out of the proceeds of the sale upon distribution thereof as hereinafter set forth, and said purchaser shall be credited therefor on account of the purchase price such sums in cash as would be payable in respect of such bonds and coupons out of the proceeds of sale if the whole amount of the purchase price were payable in cash. The Court reserves the right to resell the property upon such notice as the Court may direct, in case the purchaser shall fail or omit to make any payment on account of the unpaid balance of the purchase price 62
within thirty days after the entry of the order requiring such payment. All sums of money and all bonds and coupons received by the Special Masters shall be forthwith deposited in the registry of this court. The purchaser or purchasers, his or their successors or assigns, shall not be bound to inquire or see to the application of the purchase money. The complainant, Continental Trust Company of the City of New York, or any holder or holders of any of said first mortgage bonds, may bid and purchase at said sale.

The purchaser or purchasers, his or their successors and assigns, shall have the right to enter his or their appearance in this court, and he or they, 63
or any of the parties to this suit, shall have the right to contest any claim, demand or allowance existing at the time of the sale and then undetermined, and any claim or demand which thereafter may arise or be presented which would be payable by such purchaser or purchasers, his or their successors or assigns, or which would be payable out of the purchase price, and he or they may appeal from any decision relating to any such claim, demand or allowance.

64 VI.—The funds arising from the sale of the said mortgaged premises shall be applied as follows:

(1.) To the payment of the costs of this cause and of all proper expenses attendant upon said sale or sales, including the compensation of the Special Masters appointed to make the sale, which, exclusive of his necessary expenses, shall not exceed $1,250 to each Special Master, and the payment of all charges, compensations, allowances and disbursements of the complainant, the Continental Trust Company of the City of New York, and its solicitors and counsel, and of the said John M. Butler, the deceased complainant, and of
65 the Receiver, and also all other proper allowances, compensation and disbursements. All of the payments to be made under this subdivision shall be hereafter fixed and allowed and taxed by this Court.

(2.) To the payment of any receiver's certificates and liabilities issued or incurred under the order of this Court, and then outstanding, together with the interest accrued thereon to the date of payment.

(3.) To the payment, so far as the same shall not theretofore have been paid by the Receiver in this cause, of the following amounts found by decrees of the Circuit Court of the United States for the Dis-
66 trict of Indiana, entered August 14, 1893, and September 26, 1893, to be due under prior decrees of said Court against S. H. Kneeland for the payment of part of the purchase price bid by said Kneeland on the foreclosure sales under decrees of said Court, of the Toledo Division and the St. Louis Division, respectively, of the Toledo, Cincinnati and St. Louis Railroad Company, to wit, to the American Surety Company, the sum of $323,909.99 and interest thereon at the rate of six per cent. per annum from the first day of July, 1894; to the Northern National Bank of Toledo, the sum of $33,310.05

and interest thereon at the said rate from the 67
first day of January, 1898; to the State Trust Company, the sum of $52,247.30 and interest thereon at the rate aforesaid from the first day of January, 1898, and to John T. Newton, the sum of $74,625.28 and interest thereon at the rate aforesaid from the first day of January, 1898.

(4) To the payment of any claims to recover which intervening petitions have been filed and are now pending herein, and in which it shall be adjudged by this Court that the same are prior in lien to said first mortgage of said respondent railroad company.

68

(5) Any residue of the fund realized from said sale shall be applied to the payment of the principal of said first mortgage bonds and the interest and coupons thereon, with interest from the date of this decree to the date of payment. Any coupons upon said first mortgage bonds maturing prior to June 1, 1893, the validity of which may be duly established in this case, shall be entitled, with interest thereon from the maturity thereof to the date of this decree to share *pro rata* with the bonds and coupons hereinabove adjudged to be outstanding in the proceeds of sale of the mortgaged property.

In case said residue shall be insufficient to pay 69
said first mortgage bonds, and said coupons and interest thereon in full, then the same shall be paid *pro rata* without discrimination between the bonds and coupons, and each of said bonds presented for payment shall be stamped by the Special Master so as to show the amount which has been paid on such bonds and the coupons thereto attached, or, if presented by the purchaser or purchasers, the amount credited as paid thereon, and shall be returned to the holders thereof. Any detached coupons for interest on said first mortgage bonds shall be stamped

70 in such manner as to indicate that they have been partly paid.

(6) If, after making all the foregoing payments there shall be any surplus, then the same shall be applied as the Court shall thereafter order and direct.

All payments for any of the purposes aforesaid made by the purchaser shall be treated as advances, and subject to final adjustment.

When the Special Masters shall be prepared to pay out of the proceeds of sale the bonds or coupons to be paid as above specified they shall give notice of the time when and place where they will be pre-
71 pared to make such payment, by publication at least once a week for two successive weeks in a newspaper published in the City of New York, and no holder of any claim or bond or coupon of the payment of which notice shall have been so given, who shall fail to present the same for payment at the time and place specified, shall be entitled to the payment of any interest thereon after the date out of the proceeds of the sale, and said Special Masters may make such payment in the City of New York and personally, or through any bank or bankers, or through the complainant, the Continental Trust Company of the City of New York.

72 VII.—Upon confirmation of said sale and payment of the purchase price bid by the purchaser o. purchasers of said property, or upon making such provision for the payment thereof as the Court shall approve, the said Special Master making the sale shall execute a deed or deeds and other proper instruments conveying and transferring the property purchased to such purchaser or purchasers or his or their successors or assigns; and upon the execution and delivery of such deed or deeds, the grantee therein shall be let into possession of the premises and property conveyed and

transferred and the complainant, the Continental Trust Company of the City of New York, shall thereupon be discharged of its trust in the premises, except as to the distribution of any money in its hands, and as to the entry, collection and distribution of any deficiency judgment which it may obtain, and the Receiver herein, and any party to this suit having possession of the same, shall deliver such property over to the purchaser or purchasers, his or their successors or assigns, together with any property and income theretofore acquired or received by any receiver since the commencement of this suit, in the management or operation of the mortgaged premises; subject, nevertheless, to the condition that the Court may retake and resell the property conveyed, in case the purchaser or purchasers, his or their successors or assigns, shall fail within the time hereinabove limited to pay any balance of the purchase price remaining unpaid.

The purchaser or purchasers, and his or their successors and assigns, shall, after such delivery of the premises, hold, possess and enjoy the said railroad, premises and property and all the rights, privileges, immunities and franchises appertaining thereto, as fully and completely as said respondent, Toledo, St. Louis and Kansas City Railroad Company, now holds or enjoys or held or enjoyed the same at the time of the execution and delivery of said first mortgage or at any time since was or is entitled to hold or enjoy the same; and the respective purchaser or purchasers and his or their successors and assigns, shall thereupon be entitled to have and to hold the premises and property so conveyed and transferred, free and discharged from the lien and encumbrance of said first mortgage and from the claims of all other parties to this suit and those claiming under them, save only as herein expressly reserved, and save only as to such claims as may have accrued against the Receiver in his operation of the road within six months prior to the entry

of this decree, and which are prior in right to the mortgage lien herein foreclosed, and which shall not have been presented to this Court upon intervening petition or by the Receiver for allowance before the entry of the decree of confirmation and distribution herein.

VIII.—The respondent, Toledo, St. Louis and Kansas City Railroad Company, shall, at the time of the execution of said deed or deeds by the Special Masters, as a further assurance to the purchaser or purchasers, his or their successors or assigns, execute its deed or deeds or join with said Special Masters in the execution of the deed or deeds to be made by them, and shall thereby convey, transfer and release to the purchaser or purchasers, his or their successors or assigns, all its right, title and interest in the property and franchises conveyed and transferred to such purchaser or purchasers by said Special Masters; and said Continental Trust Company of the City of New York, as trustee under said first mortgage, shall by proper deed or deeds or other instruments, transfer and release to such purchaser or purchasers all its right, title and interest under the said first mortgage, in or to the property so conveyed and transferred; and, further, the Receiver in this cause shall make and deliver a good and sufficient deed or deeds, conveying and assigning to the purchaser or purchasers the right, title and interest of the receiver in or to any property vested in him or standing in his name, or to which he, as such receiver, in the management or operation of the mortgaged premises, or by use of the income or proceeds of any part thereof, or in any manner, has or shall have acquired title, or of which he shall be possessed, or to which he shall be entitled.

IX.—In case the proceeds of said sale shall not be sufficient to pay, in full, the amounts hereinbefore found to be due for principal and interest upon

said first mortgage bonds, then the said Special 79
Masters shall report to the Court the amount of the deficiency or deficiencies, and the complainant, on the confirmation of said report, shall have judgment against the respondent railroad company for the amount of such deficiency, and shall have execution therefor, pursuant to the rules and practice of this Court.

X.—It is further ordered, adjudged and decreed, that the cross bill of said cross-complainants Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin and Ellen V. Hamlin be, and the same hereby is, dismissed on the merits for want of equity as against the complainant Continental Trust Company of 80
the City of New York, and that said complainant, Continental Trust Company of the City of New York, recover of the said Charles Hamlin, Hannibal E. Hamlin, Frank Hamlin and Ellen V. Hamlin, its costs in said cross-action, to be taxed, and that said complainant Trust Company have execution therefor.

XI.—It is further ordered, adjudged and decreed that the amended intervening petition of Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotive Works, the Rhode Island National Bank, and the Signal Oil Works, Limited, be, and the same is 81
hereby dismissed on the merits for want of equity as against the complainant Continental Trust Company of the City of New York and that the Complainant Continental Trust Company of the City of New York recover from said petitioners, Ferdinand E. Canda, Jules S. Bache, the Contracting and Building Company of Kentucky, the Rhode Island Locomotice Works, the Rhode Island National Bank, and the Signal Oil Works, Limited, the costs of said complainant in said proceeding, to be taxed, and that said complainant have execution therefor. Subject in all respects as

82 hereinabove found and decreed, such dismissal shall be without prejudice to the right of the Contracting and Building Company of Kentucky to proceed under its petition filed October 31, 1893, and to the right of the Rhode Island Locomotive Works to proceed under the amended petition filed December 28, 1893.

XII.—All questions not hereby disposed of, including the discharge of the Receiver and the settlement of his accounts, are reserved for future adjudication, and any party to this cause may at any time apply to this Court for further relief at the foot of this decree.

83 April 1, 1898.

WM. H. TAFT,
Circuit Judge.

84

Exhibit B.

85

IN THE CIRCUIT COURT OF THE UNITED STATES.

FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, Survivor of John M. Butler, Complainant, vs. TOLEDO, St. LOUIS AND KANSAS CITY RAILROAD COMPANY *et al.*, Respondents.	In Equity, No. 1205. 86
CHARLES HAMLIN *et al.*, Cross-Complainants, vs. CONTINENTAL TRUST COMPANY OF THE CITY OF NEW YORK, TOLEDO, St. LOUIS AND KANSAS CITY RAILROAD COMPANY, Cross-Respondents.	Cross-Bill. 87

Now, on the 17th day of April, 1900, come again the parties by their respective solicitors, and come also the purchasers, Morton S. Paton and Richard B. Hartshorne, by their counsel, and the motion of

88 the complainant, Continental Trust Company of the City of New York, that the report of Frank H. Shaffer and Merrill Moores, the Special Masters, filed herein on the 2d day of April, 1900, should be approved and confirmed, and that the sale of the mortgaged railroad, equipment, franchises and property of the respondent, Toledo, St. Louis and Kansas City Railroad Company, should be confirmed and made absolute, came on to be heard:

And it appearing by the report of said Special Masters that said Special Masters have fully complied with the directions of the decree dated the 1st day of April, 1898, entered in this cause, and of the
89 decree entered in this cause, dated November 11, 1899, modifying said decree of April 1, 1898, and of the decretal order entered in this cause on January 19, 1900, and of the decree entered in this cause on said January 19, 1900, re-entering and confirming said decree dated November 11, 1899, as to the sale of said railroad, equipment, franchises and property; that said railroad, equipment, franchises and property have been duly advertised, offered for sale and sold to said purchasers; that said purchasers have made the deposit and payment required by said decrees and by the terms of sale, and that said sale ought to be confirmed:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED
90 that the said report of said Special Masters be, and the same hereby is, in all things approved and confirmed, and that said sale to said Morton S. Paton and Richard B. Hartshorne, as joint tenants and not as tenants in common, as an entirety, without valuation, appraisement, redemption or extension, of all and singular the railroad, equipment, franchises and property of the respondent, Toledo, St. Louis and Kansas City Railroad Company, described in and by said decree entered in this cause, and dated the 1st day of April, 1898, and, by said decree, adjudged to be subject to the lien of the first mortgage of said respondent railroad company, at and

for the sum of twelve million two hundred thousand dollars by them bid, be, and the same hereby is, in all things ratified, approved, confirmed and made absolute. 91

And the said purchasers having deposited with the complainant, Continental Trust Company of the City of New York, for the purpose of paying, satisfying and making good the bid of such purchasers for said mortgaged railroad, equipment, franchises and property, first mortgage bonds of said respondent, Toledo, St. Louis and Kansas City Railroad Company issued under said first mortgage of said respondent railroad company, dated June 19, 1886, to the amount at par of $8,814,000, bearing the coupon maturing June 1, 1893, and all subsequent coupons, and producing the certificate or certificates of said Trust Company that it so holds the same subject to the order of said Special Masters, it is 92

ORDERED, ADJUDGED AND DECREED, that such provision for the payment of the residue of said bid of said purchasers, is satisfactory to this Court, and is hereby approved by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that upon the delivery by said purchasers to said Special Masters of said certificate or certificates of deposit of said Trust Company, the Special Masters sign, seal, execute, acknowledge and deliver a deed or deeds of conveyance to said purchasers, as joint tenants and not as tenants in common, or to the persons or corporations to whom they may assign their rights, of all and singular the railroad, equipment, franchises and property so sold as aforesaid; that the respondent, Toledo, St. Louis and Kansas City Railroad Company, the complainant, Continental Trust Company of the City of New York, as surviving trustee under said first mortgage of said Toledo, St. Louis and Kansas City Railroad Company, and the Receiver in this cause, respectively, and all other parties to 93

this cause, join in said deed or deeds of said Special Masters, or execute and deliver separate conveyances of the property embraced therein on demand of said purchasers, their successors or their assigns, and that, in default of such deed or deeds by any of the parties hereto, this decree shall have the force and effect of such deed or deeds, conveying all its, their or his interest in said railroad, equipment, franchises and property so sold as aforesaid; that said purchasers shall have the right to assign their interest as an entirety or in parcels, as said purchasers may determine; that, upon filing such assignments with said Special Masters, said Special Masters and said parties shall make their deed or deeds of conveyance accordingly; and that, in the event of any assignment by said purchasers of their said bid or interest, or any conveyance by them of said railroad, equipment, franchises and property, all obligations incurred by said purchasers on account of the purchase of said railroad, equipment, franchises and property, may be transferred to and assumed by such transferee or transferees, grantee or grantees, and thereupon said purchasers shall individually be discharged from all such obligations and liability.

IT IS FURTHER ORDERED AND DECREED, that upon the delivery to said purchasers or to their successors or their assigns of said deed or deeds of conveyance to be made by said Special Masters, the grantee or grantees therein shall fully possess and be invested with said railroad, equipment, franchises and property so sold and so conveyed, as the absolute owners thereof; that on the exhibition to him of said deed or deeds the Receiver of this Court, who, until such exhibition thereof to him, shall continue as heretofore, the operation of the mortgaged premises, is authorized and directed, and is required, to let said grantee or grantees into possession of the premises conveyed; that the Receiver, or any party to this cause having possession of the

same, deliver to said grantee or grantees all property embraced in said Special Masters' deed or deeds, together with and including any property and income in the hands of the Receiver at any time acquired or received by him in the management of the mortgaged premises down to the time of such delivery of possession, subject, nevertheless, as hereinafter set forth, and that said purchasers, their successors or their assigns, on receiving said conveyance or conveyances, shall be, and are hereby, subrogated to all and singular, the rights of all parties to this action with respect to the railroad, equipment, franchises and property sold as aforesaid, with the right to prosecute and defend all issues in this suit and all suits, actions and proceedings involving the same, whether in the name of any of the parties hereto, or of said Receiver, or otherwise, including the right to prosecute proceedings in error or on appeal. 97 98

It is further ordered and decreed, that said first mortgage bonds and coupons deposited with the complainant Continental Trust Company of the City of New York, and forming the subject of its certificates of deposit which may be delivered to said Special Masters, remain on deposit with said complainant trust company to abide the further order of the Court herein.

IT IS FURTHER ORDERED AND DECREED that, upon making, in accordance with said decree of April 1, 1898, payment of the amounts by said decree directed to be paid in priority to the first mortgage bonds and the interest thereon, any residue of the fund realized from said sale shall be applied, in accordance with said decree and as therein directed, toward the payment of the amount by said decree adjudged to be due at the date thereof, in respect of said first mortgage bonds, to wit, the sum of $12,028,500, with interest on said amount from the date of said decree to the date of payment; that the distribution of the proceeds of sale and all 99

allowances and compensation are reserved for future order, and that the delivery of said deed or deeds of conveyance and of the possession of said railroad, equipment, franchises and property, sold as aforesaid, shall be subject to the right of the Court to require such further payment or payments to be made in cash on account of said purchase price bid, in order to meet claims which, under said decree, are or may become payable out of the proceeds of sale in priority to the said amount due on said first mortgage bonds, as the Court may from time to time direct, and the Court reserves the right in case such purchasers, their successors or their assigns, shall fail or neglect to make any payment in cash on account of any unpaid balance of the purchase price bid within thirty days after the entry of an order requiring such payment and service of a copy of said order upon said purchasers, their successors or their assigns, to retake and resell the mortgaged railroad, equipment, franchises and property, and jurisdiction of this cause is retained for that purpose.

16637

SUPREME COURT OF THE UNITED STATES, 103

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,

AGAINST

SAMUEL HUNT, as Receiver of the St. Louis, Toledo and Kansas City Railroad Company and Toledo, St. Louis and Western Railroad Company,
Appellee. 104

MEMORANDUM IN SUPPORT OF MOTION FOR CERTIORARI TO SUPPLY DIMINUTION OF RECORD.

I.

The papers desired to be included in the record on appeal are the decree of foreclosure entered in the original cause, and the order of confirmation of sale made under that decree. The very decree now appealed from was made in a proceeding taken in the foreclosure suit, at the foot of the decree of foreclosure which it is sought to have included in the record. 105

The importance of having the decree of foreclosure and order of confirmation before the Court on this appeal will be obvious when it is stated that the title of the appellee the Toledo, St. Louis and Western Railroad Company to the securities in controversy, and which have been adjudged by the decree

106 appealed from to belong to the appellee, *depends upon the decree of foreclosure*.

It is essential that that the order of confirmation should be before the Court upon this appeal, for the reason that it will appear from an inspection of that order that the distribution of the fund resulting from the foreclosure sale was reserved for further order of the Court, and thus the jurisdiction of the parties and subject matter of the foreclosure litigation was retained by the Circuit Court so as to authorize the proceeding in which the decree now appealed from was made.

The decree of foreclosure and order of confirmation were an essential part of the record in the
107 suit in which the decree and interlocutory orders appealed from were made, and were necessarily before the Circuit Court when the decree and interlocutory orders appealed from were made, and were referred to in the opinion of the Circuit Court granting the decree appealed from (*Opinion, Record, p. 96*).

On page 96 of the record the Court says in its opinion:

> "When the Receiver used the moneys of the receivership to discharge underlying liens, an equitable right accrued to him and to those whom he represented, to be reimbursed out of the bonds deposited with the Farmers' Loan
> 108 and Trust Company, and that right became a part of the mortgaged property and passed by sale to the purchaser and is now vested in the Toledo, St. Louis and Western Railroad Company. This right or equity is covered by the fourth paragraph of the decree of confirmation, which describes the property found by the Court to be subject to the lien of the mortgage."

This decree, so especially referred to by the Court, is one of the papers which has been omitted from the record.

The Court further says: 109

> "The proceeds of the sale of the mortgaged property have not been distributed but are still under the control of the Court. The distribution thereof was expressly reserved for future order by the decree confirming the sale, and no order of distribution has since been made, and this Court has exclusive jurisdiction to determine when, how and to whom the distribution shall be made."

The order of confirmation is also omitted from the record, and it is desired to supply it.

The petition upon which the decree appealed from was made was originally filed by the Receiver of the Toledo, St. Louis and Kansas City Railroad Com- 110
pany, praying that the securities in controversy should be delivered to him as a part of the assets of the railroad company. Subsequently an order was entered substituting the Toledo, St. Louis and Western Railroad Company, assignee of the purchaser at the foreclosure sale, in the place of Hunt, as Receiver. The order of substitution could be justified only because the securities in controversy were a part of the assets of the railroad company embraced in the terms of the decree, and it is therefore necessary to resort to the decree of foreclosure to see what assets were covered by that decree.

The stock and securities involved were property held in trust for the Toledo, St. Louis and Kansas 111
City Railroad Company, and it might be doubtful if it passed to the purchaser at the sale under a decree foreclosing a mortgage upon the property of the railroad company; but section four of the decree of foreclosure specifically covers all property held in trust for the railroad company.

It would be idle to say that the decrees of sale and of confirmation were not before the Court below.

This whole proceeding was in the foreclosure suit preceding in the Circuit Court, and the whole of the record in that suit was before the Court.

112 This appeal is wrongly entitled. There is no suit of " Bache *vs.* Hunt," and the manner in which the appellant has caused the record to be made up may create confusion.

II.

The motion for *certiorari* is made as early as practicable after the discovery by counsel of the defect in the record, and should be granted in accordance with the practice of the Court. No delay in the argument of the appeal is desired. We wish to argue it when reached.

113 *Morgan* vs. *Curtenius*, 19 How., 8.
Stearns vs. *The United States*, 4 Wall., 1.
Clark vs. *Hackett*, 1 Black, 77.
Bien vs. *Heath*, 142 U. S., 704.

Respectfully submitted,

ADRIAN H. JOLINE,
Of Counsel for Appellee.

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16639
FILED
FEB 25 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 177.

JULES S. BACHE,
Appellant,
against

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company; and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLEES.

ADRIAN H. JOLINE,
CLARENCE BROWN,
Counsel for Appellees.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

16640

Supreme Court of the United States,

OCTOBER TERM, 1903,

No. 177.

JULES S. BACHE,
Appellant,

vs.

SAMUEL HUNT, as Receiver of the Toledo, St. Louis and Kansas City Railroad Company and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY,
Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF FOR APPELLEES.

This cause comes before the Court upon an appeal by Jules S. Bache from an order of the Circuit Court of the United States for the Northern District of Ohio, adjudging that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of Samuel Hunt, Receiver, is entitled to certain securities, and from certain interlocutory orders, including an order overruling the plea of Bache, the question arising as to the jurisdiction of the Circuit Court.

Statement of Facts.

Prior to 1886, the Toledo, Cincinnati and St. Louis Railroad Company, a consolidated corporation under the laws of Ohio, Indiana and Illinois, owned and operated a narrow gauge line of railway extending from Toledo, Ohio, to East St. Louis, Illinois. The road consisted of two divisions: the Toledo Division, extending from Toledo to Kokomo, Indiana, and the St. Louis Division, extending from Kokomo to East St. Louis. Each division was subject to divisional mortgages. Default having been made in the conditions of the divisional mortgage, proper actions were instituted for the foreclosure of these mortgages, and on December 30, 1885, the Toledo Division was sold to Sylvester H. Kneeland under decrees entered in the Circuit Court of the United States for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court for the Northern District of Ohio, foreclosing the first mortgage thereon made by the Toledo, Delphos and Burlington Railway Company one of the constituent companies of said Toledo, Cincinnati and St. Louis Railroad Company, and on the same day, the St. Louis Division was also sold to Kneeland under decrees entered in the Circuit Court for the District of Indiana, the court of primary jurisdiction and in the Circuit Court for the Southern District of Illinois, foreclosing mortgages thereon made by the Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, another of said constituent companies (*Petition*, *Record*, pp. 2, 3).

After the usual provisions for the sale of the mortgaged railroad at not less than the upset price fixed by such decree, each decree provided that within twenty days after the confirmation of the sale thereunder, the purchaser should pay of the unpaid purchase money, a sum sufficient, taken with the cash payment to be made at the time of sale, to pay the costs, fees and allow-

ances and the claims and debts, including taxes, determined to be due and payable as court and receiver's indebtedness, excepting such final decrees upon said claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession of the railroad and property purchased; that upon confirmation of the sale and the payment within twenty days thereafter of such part of the purchase money as was so required to be paid by him in cash, the masters should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property; that said deed should contain an express stipulation reserving to the Court jurisdiction over the mortgaged property conveyed, with full authority and power, upon default of the purchaser in complying with the requirements of the decree respecting payment of the purchase money, to retake possession of the railroad and property conveyed, and forthwith sell the same *(Petition, Record,* p. 3).

Each of the decrees further provided that the residue of the purchase money not required to make these payments, should be paid by the purchaser from time to time upon the amounts adjudged by the court to be due and payable upon court and receiver's indebtedness, and to be prior to the lien of the mortgage foreclosed, until the entire purchase money should be exhausted, if it should require the entire purchase money to pay and discharge said court and receiver's indebtedness, and that, if any surplus be left after the payment of the court and receiver's indebtedness, the same should be distributed *pro rata* upon the coupons and bonds of said mortgage until the same should be fully paid *(Petition, Record,* p. 4*)*.

It was also provided that the purchaser or purchasers at the foreclosure sale reserved the right to appeal from any order or final decree made by the court decreeing the payment of claims adjudged to be payable as court and receiver's indebtedness, and to be prior in equity to the mortgage in suit *(Petition, Record,* p. 4).

Said sales were duly confirmed on February 5, 1886, and on March 10, 1886, by order of said Circuit Court for the District of Indiana, entered on that day, the form of the proposed masters' deed was approved and its delivery directed *(Petition, Record,* p. 4).

The order of confirmation contained similar provisions regarding the payment by the purchaser of the residue of the purchase price and reserving jurisdiction over the mortgaged property to be conveyed by the special masters (*Petition, Record,* p. 4).

Pursuant to said order and on March 10, 1886, a master's deed of the property was delivered to the purchaser. This deed contained proper provisions in accordance with said provisions of the decrees and of the order of confirmation *(Petition, Record,* pp. 4, 5).

Pending these foreclosures, an agreement of reorganization *(Petn. Exhibit A)* had been made under date of April 9th, 1884, between certain mortgage bondholders and creditors of said Toledo, Delphos and Burlington Railway Company and certain mortgage bondholders and creditors of said Toledo, Cincinnati and St. Louis Railroad Company of Indiana, and Illinois, and James M. Quigley, Charles W. Pierce, Halsey J. Boardman, John McNab and Charles T. Harbeck; and under the terms of this agreement, Quigley, Pierce and Boardman were constituted a reorganization committee of said St. Louis division bondholders, and Quigley, Harbeck and McNab were constituted a reorganization committee of said Toledo division bondholders. For Pierce, one Warren D. Hobbs was thereafter duly substituted *(Petition, Record,* p. 5; *Agreement,* pp. 14–25*)*.

The purchase of said division had been made by Kneeland under the terms of a memorandum dated December 18, 1885 (Exhibit B to Petition, pp. 25, 26), between Kneeland, and said Quigley as chairman of

said committees, pending the settlement of a formal contract with Kneeland.

Subsequent to said foreclosure sales, Kneeland entered into two agreements, each dated January 23, 1886, one with each of said reorganization committees *(Exhibits C and D, pp. 26, 33)*. The two agreements were, *mutatis mutandis*, substantially in the same form, and recited that the committee, party thereto, had determined, as the most available method to secure the best results, to transfer all its right, title and interest in the said division and to sell and transfer all of the first mortgage bonds held by such committee to Kneeland, upon the conditions therein stated.

The agreements provided generally that Kneeland should complete his purchase of the two divisions in accordance with the decrees of foreclosure, and proceed to form under the laws of Ohio, Indiana and Illinois, three railroad corporations, which, as soon as practicable, should be consolidated by him; and that the consolidated company should immediately issue:

(a) Six per cent. thirty-year first mortgage bonds to the amount of $20,000 per mile.

(b) Common stock to the amount of $25,000 per mile (*Record*, pp. 27–29).

Kneeland further undertook that the consolidated company should, as soon as formed, change its gauge to standard gauge, lay down steel rails, widen embankments and equip its road with necessary rolling stock. The first mortgage bonds and common stock of the consolidated company were, on the issue thereof, to be deposited with two trustees—one selected by Kneeland and one by the committees—and delivered by these trustees to Kneeland as the work of reconstruction and equipment should proceed (*Record*, pp. 28, 29).

The agreement further provided for the issue by the consolidated company of $5,805,000 four per cent. non-voting convertible preferred stock, of which $4,805,000 should be distributed at specified rates to the narrow-

gauge first mortgage bondholders, and the residue, $1,000,000 thereof, should be deposited in the hands of said trustees, to be delivered to Kneeland for use in compromising and settling claims and suits then existing and pending, or suits that might thereafter be brought against the lines of the consolidated company *(Record*, pp. 29, 30).

To carry these agreements into effect, Kneeland caused to be organized under the laws of Ohio, Indiana and Illinois, corporations respectively capitalized at $25,000 per mile of road, and on the organization of these companies, entered into a contract with each of them substantially in the same terms *(Exhibit E, pp. 41-46)*, by which he agreed to convey to such company the line of railroad and appurtenant property in the state in which such company had been incorporated, to cause the other two companies to consolidate therewith, and further agreed, in consideration of the securities to be issued by the consolidated company other than its common capital stock, that the consolidated company should broaden the gauge of its entire line from Toledo to East St. Louis and make the same a first-class standard-gauge railroad and equip the same accordingly. In consideration of said agreement on the part of Kneeland and of such conveyance to it of the specified line of railroad, the company agreed to deliver to Kneeland all its common capital stock (except the shares qualifying directors), and further agreed that the consolidated company should issue in full and complete payment of the purchase price of said railroad and property and for such reconstruction and equipment and for the purpose of exchange for the narrow gauge securities, and for the payment of underlying debts, certain rights of way, and other purposes, stock and first mortgage bonds of the character and to the amounts contemplated under said agreements of January 23, 1886 *(Record, pp. 5, 6)*.

Upon the execution of these contracts, Kneeland delivered to these constituent companies proper deeds of the railroad and appurtenant property to be conveyed by him, the consideration expressed for such conveyance being in each case the capital stock of the grantee, except the shares qualifying directors *(Record, p. 5)*.

On June 12th, 1886, these constituent companies entered into articles of consolidation, under which the Toledo, St. Louis and Kansas City Railroad Company was formed. The articles of consolidation provided for the issue of common stock, preferred stock and first mortgage bonds to the amounts and otherwise in accordance with the requirements of the contracts between Kneeland and the constituent companies, that the common stock $12,250,000, the aggregate of the capital stock of the constituent companies, should be issued in exchange, share for share, for the stock of the constituent companies, and that the directors and proper officers should have power to issue the preferred stock and first-mortgage bonds, and execute and deliver the first mortgage *(Record, pp. 6, 7)*.

Immediately upon such consolidation, the Toledo, St. Louis and Kansas City Railroad Company, by appropriate corporate proceedings, authorized the issue of its said preferred and common stock, and issued the same, and on June 19, 1886, executed its 9,800 thirty-year six per cent. first-mortgage bonds for $1,000 each, and to secure the payment of said bonds, on the same day executed and delivered to the American Loan and Trust Company and Joseph E. McDonald, its first mortgage on its line of railroad, equipment and property. Of these bonds, only 9,000 were ever issued.

Said first mortgage bonds and said common stock were, on issue, delivered to Isaac W. White and Robert G. Ingersoll, trustees appointed under the two agreements of January 23d, 1886 *(Petn., Exhibits C and D)*, and, from time to time thereafter, deliveries thereof were made by said trustees (*Record*, p. 7).

In the course of the reconstruction and equipment of the road, various controversies arose between Kneeland and the Railroad Company, and on June 1st, 1891, an agreement of settlement was made between them (*Petn., Exhibit F*). This agreement was conditional in form, and on June 3, 1891, the Railroad Company and Kneeland entered into a supplemental agreement by which the terms of settlement under the agreement of June 1, 1891, were declared to be absolute, the remedy of either party for a breach, to be in damages only. To both these agreements, each of the reorganization committees assented in writing (*Record*, p. 8).

At the time of the execution of these agreements of settlement, Kneeland had not completed payment of the purchase price of the narrow-gauge railroad and property purchased by him at said foreclosure sales, and there were then outstanding unpaid claims to the amount of $350,000 and upwards, which, under the terms of the foreclosure decrees, had been contested by Kneeland, and in respect of which a priority was claimed which, if finally established, entitled said claims to be paid out of the proceeds of said divisions, in priority to any distribution out of said proceeds of sale, to the holders of the narrow-gauge bonds secured by the mortgages foreclosed by the respective decrees under which said sales had been made; and by the agreement of June 1st, 1891, Kneeland in express terms admitted his liability to pay these claims (*Record, pp. 8, 48*).

By the agreement of settlement of June 1st, 1891, after providing for the disposition, in accordance therewith, of certain securities in the hands of the trustees under the agreement of January 23, 1886, the Railroad Company and Kneeland, the parties to said agreement of settlement, consented and requested said trustee to deliver all the rest and residue of said securities in their hands to the Farmer's Loan and Trust Company upon the execution by said trust company of a declaration of trust to the effect that it agreed

to receive and hold such securities in accordance with said trust, and that said trust company should thereupon hold the same in trust as security for the payment of all purchase money under said foreclosure sale due from said Kneeland, to the extent of all claims upon the proceeds of said sale which were prior to the claims of said first mortgage bonds of said Toledo, Delphos and Burlington Railway Company of Ohio and Indiana and said Toledo, Cincinnati and St. Louis Railroad Company of Indiana and Illinois, and upon the further trust to pay over and deliver said securities to said Kneeland as fast as *Kneeland* should pay said claims against said proceeds of the narrow gauge foreclosure sales, in the manner and at the rate in the agreement provided (*Record*, pp. 8, 9; 50). The agreement was silent as to the disposition to be made of these securities if Kneeland should not pay these claims.

In pursuance of the agreement of settlement, the Farmers' Loan and Trust Company executed at its foot a declaration of trust accordingly (*Petn. Exhibit F., Record, p. 53*), and the trustees under the agreements, of January 23, 1886, delivered to the trust company $132,000 first mortgage bonds, $500,000 preferred stock and $1,169,000 common stock. (*Record*, p. 9).

The trust company later received from Isaac W. White, one of the trustees under the agreements of January 23, 1886, to be held by it for the purposes of the agreement of settlement, $26,000 first mortgage bonds. These bonds were so delivered to the Trust Company by White in 1893 pursuant to an order of this Court in this cause under a settlement between White and the receiver in this action. (*Id.*).

All the securities at any time so delivered to the Trust Company have since been held by it and are now in its hands. (*Id.*).

In May, 1893, Stout and Purdy filed judgment creditors' bills against the Toledo, St. Louis and Kansas City Railroad Company in the Circuit Court for the

Northern District of Ohio and in the Circuit Courts for the District of Indiana and for the Southern District of Illinois, and under these bills a receiver of the railroad company and *of all its property* was duly appointed. (*Record*, pp. 9, 10).

On June 1, 1893, the Railroad Company made default in the payment of the interest on its first mortgage bonds, and in December, 1893, the Continental Trust Company and John M. Butler, the substituted trustees under the first mortgage, filed bills for the foreclosure of the first mortgage in the Circuit Court for the Northern District of Ohio and in the Circuit Courts for the District of Indiana and for the Southern District of Illinois. The same receiver was also appointed receiver under these bills of foreclosure, and the respective judgment creditors' actions consolidated with the actions of foreclosure under the title of the foreclosure (*Record*, p. 10).

Samuel Hunt, the petitioner, was, at the time of filing the petition, and had been since December 1, 1898, receiver of said railroad company and of all its property, duly appointed by each of said circuit courts in said causes (*Record*, p. 10).

Notwithstanding the agreement of settlement of June 1, 1891 (*Petn. Exhibit F*), Kneeland did not at any time pay any part of the residue of the purchase price of the narrow gauge lines, although claims to the amount of upwards of $350,000 represented by receivers' certificates issued in the course of the narrow gauge foreclosures, had been finally established as prior claims in accordance with said decrees of foreclosure, and the payment thereof by him as part of the unpaid residue of the purchase price, directed by proper orders. (*Record, p. 10*). The holders of these certificates thereupon in accordance with the provisions of the decrees of foreclosure, attempted to enforce payment out of the narrow gauge properties sold, *i. e.*, out of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company.

Thereafter, in February, 1898, R. F. B. Pierce, then receiver in the cause, presented a petition to the Circuit Court for the Northern District of Ohio setting up these facts, and by its order thereon that court found that there was due in respect of said prior claims, the amount of upwards of $500,000, and that the holders thereof were entitled to the payment out of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company in priority to said mortgage. The receiver was directed to take up said claims and decrees, and to pay therefor the amount thereof with interest, and for that purpose was authorized to apply out of the moneys arising from the operation of the railroad and property embraced in said first mortgage of said Railroad Company, the sum of $125,000. It was further provided by said order that for the residue of the amount necessary to take up said claims and judgments with interest, receiver's certificates be issued to the amount of $430,000, and such certificates were made a first and best lien upon all the property and assets of the Toledo, St. Louis and Kansas City Railroad Company of every nature and description wheresoever situated, then in the possession of this court and paramount and superior to the lien thereon of the first mortgage of said railroad company, then in process of foreclosure and to all liens subsequent thereto, and to all rights and claims therein of any party to this cause, or represented by any party, and that the same should be paid out of the proceeds of sale of the mortgaged premises, unless sooner paid, and might also be paid out of any funds arising from the operation of said mortgaged railroad and property available for that purpose. Similar orders were also entered in the Circuit Courts for the District of Indiana and for the Southern District of Illinois (*Record, pp.* 10, 11).

Accordingly, said receiver took up said claims and decrees and paid therefor the sum of $555,759.42, the amount thereof with interest. Said payment was

made by the receiver out of moneys in his hands arising from the operation of the mortgaged railroad and property, and by the issue of receiver's certificates to the amount of $430,000 (*Record, pp. 11, 12*).

Between July 1st, 1893, and February 1st, 1898, the receiver in the cause, out of moneys derived from the operation of the mortgaged premises, had also paid, under proper orders of court, in respect of said prior claims so taken up, interest aggregating upwards of $50,000 (*Record, p. 12*).

Of the receiver's certificates so issued, certificates to the amount of $400,000, together with interest on the entire issue from time to time outstanding, have been paid by the receiver out of the moneys in his hands arising from the operation of the mortgaged railroad and property; and by the degrees of foreclosure hereinafter mentioned, the receiver's certificates remaining outstanding were required to be paid out of the proceeds of sale of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, unless sooner paid out of the funds arising from the operation of the mortgaged property (*Record, p. 12*).

On April 1, 1898, a decree was entered in the foreclosure suit foreclosing said first mortgage of said Railroad Company and directing a sale of the mortgaged premises. Decrees of similar effect were thereupon entered in said actions pending in the District of Indiana and in the Southern District of Illinois (*Record, p. 12*).

Said decree of foreclosure having been affirmed by the Circuit Court of Appeals, on appeals prosecuted to said court by Bache and Kneeland among others, the premises and property adjudged to be subject to the lien of said first mortgage, were, in pursuance of said decrees of foreclosure, sold on the 27th day of March, 1900, to Morton S. Paton and Richard B. Hartshorne for the sum of $12,200,000, and said sale was, by order of the Circuit Court for the Northern

District of Ohio, entered April 18, 1900, by order of the Circuit Court for the district of Indiana, entered April 23, 1900, and by order of the Circuit Court for the Southern District of Illinois, entered April 23, 1900, duly confirmed and made absolute (*Record, pp. 12, 13*).

At the time of sale, there was due in respect of said first mortgage bonds and coupons of said Toledo, St. Louis and Kansas City Railroad Company, approximately, the sum of $13,500,000, and the dividend to which any bond with the coupon maturing June 1, 1893, and subsequent coupons, will be entitled out of the proceeds of sale, cannot, therefore, exceed the sum of $1,260 (*Record, p. 13*).

By these decrees of foreclosure and sale, it is adjudged that the first mortgage of said railroad company is a lien upon the railroad and property of said railroad company, whether owned at the date of the mortgage foreclosed or thereafter acquired, and is a lien upon all moneys, profits and income derived by any receiver in said causes from the operation of said mortgaged railroad and property. All said amounts, therefore, which have been so paid in taking up said prior claims and decrees, have been so paid or must be paid either out of said mortgaged premises or out of moneys derived by the receiver from the management and operation thereof; *i. e.*, out of property otherwise applicable to the payment of the first mortgage bonds (*Record, p. 13; Supplemental Record pp. 6, 7*).

On April 18, 1900, an order was made confirming the sale (*Order, Supplemental Record, pp. 16–19*). The order, among other things, provided that "the distribution of the proceeds of sale and all allowances and compensation are reserved for future order" (*Supplemental Record, p. 18*).

On or about the 28th day of May, 1900, said Samuel Hunt, as receiver in this cause, filed his petition in the Circuit Court for the Northern District

of Ohio, in which, after setting out these facts, he prayed a decree that the petitioner is entitled out of said first mortgage bonds and said preferred stock and said common stock in the hands of said Farmers' Loan and Trust Company to be reimbursed all said amounts, with interest thereon from the

Messrs. Paton and Hartshorne assigned their bid to James N. Wallace on June 5, 1900, and thereafter an order was made upon the petition of Wallace, making him a party to the cause and dismissing Paton and Hartshorne (*Record*, pp. 68–71).

Thereafter the Toledo, St. Louis and Western Railroad Company was incorporated and acquired all the property which had been sold under the decree, including all the rights of the Receiver; and by an order entered July 28, 1900, that company was made a party to the cause and was substituted as petitioner in place of Hunt, Receiver (*Record*, pp. 71–75).

On July 28, 1900, Jules S. Bache, appearing specially for the purpose, filed a plea to the jurisdiction of the Circuit Court of the United States for the Northern District of Ohio, both of his person and of the subject matter of the petition. The plea with the exhibits attached appear in the Record at pages 76 to 93 inclusive.

The plea is based on the following grounds:

(*a*) The residence and citizenship of Bache, and the residence and citizenship of other respondents to the petition, within the State of New York.

(*b*) The pendency in the Supreme Court of the State of New York of an action instituted, prior to the filing of Hunt's petition, by Bache as a judgment creditor of Kneeland, against the Toledo, St. Louis and Kansas City Railroad Company, Kneeland and the Farmers' Loan and Trust Company, in which the last mentioned company had been appointed Receiver

of the securities forming the subject of the Hunt petition, on May 28, 1900, the same day on which the Hunt petition was filed.

(*c*) The insufficiency of the method of service upon Bache of the order to plead to the petition.

The plea came on for hearing before Judge THOMPSON, sitting in the Northern District of Ohio, and was overruled (*Opinion: Record, pp.* 93-97, *Order*, p. 97).

An order was entered on December 21, 1901, taking the petition as confessed by all the respondents other than the Continental Trust Company, which had filed an answer admitting the allegations of the petition (*Record*, p. 75); Bache; and Paton and Hartshorne, who had been dismissed from the case (*Record*, p. 98).

Bache never answered nor pleaded otherwise than by the plea which had been overruled, and an order was entered on April 7th, 1902, taking the petition as confessed as against him (*Record*, p. 100).

Thereafter, on December 4, 1902, an order was made that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of the Receiver and his predecessors, was entitled out of the first mortgage bonds and other securities in the hands of the Farmers' Loan and Trust Company to be reimbursed all the amounts, with interest, which the Receivers had paid in respect to the prior claims; that the securities should be delivered to the Railroad Company within thirty days; and that in default thereof they should stand canceled, and as of no further force or effect as obligations of the Toledo, St. Louis and Kansas City Railroad Company (*Order*, *Record*, pp. 103, 104).

On the same day Bache prayed an appeal from said order, and also from the following orders (styled interlocutory orders):

(*a*) The order of May 31, 1900, requiring certain respondents to plead to the petition;

(*b*) The order of June 9, 1900, requring the Farmers' Loan and Trust Company to plead ;

(*c*) The order of July 28, 1900, substituting the Toledo, St. Louis and Western Railroad Company in place of Hunt, Receiver ;

(*d*) The order of December 14, 1901, overruling the plea to the jurisdiction ;

(*e*) The order of April 7, 1902, taking the petition as confessed as against Bache ;

and asked that the appeal be allowed on the ground that the jurisdiction of the Court below was in issue (*Record*, pp. 104, 105). At the same time he filed assignment of errors (Record, pp. 108–112).

An order was entered allowing the appeal (*Record*, pp. 112, 113). The respondents other than Bache, were requested to join in the appeal, but have not complied with the request (*Record*, pp. 112–116).

ARGUMENT.

FIRST. The Circuit Court of the United States for the Northern District of Ohio, had full jurisdiction over the subject matter of the petition.

I. All the allegations of the petition, except so far as they are contradicted by the plea, must be taken as true.

1 Daniel's Chancery Practice, 603.
Farley vs. Kittson, 120 U. S., 303.
Hilton vs. Gayot, 32 Fed. Rep., 251.
Story's Eq. Pl., 10th Ed., 584.

II. The proceeding is not an original proceeding, but ancillary and dependent, supplementary to the original suit out of which it arose.

Preliminarily to the consideration of the legal principles and authorities governing the plea, it may be well to state succinctly the legal relations of the parties:

(*a*) By the terms of his purchase of the two divisions of the narrow gauge lines, Kneeland, as purchaser, became liable to pay and discharge the pending claims as part of his bid, as their amount and right to priority over the mortgages foreclosed should be determined by the Court.

(*b*) This obligation on the part of Kneeland was secured by the reservation by the court of jurisdiction over the narrow gauge properties and of a power of resale to enforce payment.

(*c*) This reservation of jurisdiction and power of sale followed the narrow gauge properties; and appearing in the direct chain of title, every purchaser from Kneeland, the constituent companies, the consolidated corporation, the trustees of the first mortgage, and through them to the holders of the first mortgage bonds, took with notice, and their rights were subordinated thereto.

(*d*) The agreements of January 23, 1886, under which the reconstruction of the narrow gauge lines was undertaken by Kneeland, recognized this liability on the part of Kneeland, and for the considration to be received by him thereunder, he undertook to discharge this liability, and, by such discharge, to relieve the properties from this burden.

(*e*) Accordingly the mortgage bonds of the Toledo, St. Louis and Kansas City Railroad Company, are expressed to be first mortgage bonds, and to be secured by a first lien on the property embraced therein and in part to be issued to discharge these claims. The appellant has not made the mortgage a part of the printed record, although it is specifically referred to in the petition

(p. 7), but this fact is sufficiently shown by the allegation on page 6 and from Exhibit E, page 45.

(f) As a necessary consequence, holders of first mortgage bonds, whether directly or through the trustees of the first mortgage, were interested in this obligation on the part of Kneeland, since the extent and priority of their security were directly dependent on the discharge by him of this liability.

(g) The agreement of settlement of June 1, 1891, was, therefore, an agreement for the benefit of the holders of the first mortgage bonds, and one in the fulfillment of which, and in the security for the fulfillment of which, they had a direct interest.

The agreements of settlement of June, 1891, were not agreements merely between the railroad company and a defaulting contractor, adjusting in whole or in part the differences between them. They were an adjustment of the relations arising out of the reorganization, a settlement of the obligations incurred in the reorganization under the agreements of January 23, 1886. The action contemplated was in order to effectuate the agreements of January 23, 1886, by securing the fulfillment by the contractor of the obligations into which he had entered and on the fulfillment of which the first mortgage bonds then outstanding had been issued as such.

(h) That this was the contemplation of all the parties is made clear by the form which the settlement assumed and by the joinder in the settlement of the narrow-gauge reorganization committees as parties.

(i) It is also clear that, while the first mortgage bonds remained in the hands of the trustees under the agreements of January 23, 1886, they were not enforceable against the Railroad Company. It is equally clear that, by their delivery under the terms of the agreements of settlement of June, 1891, to the Farmers' Loan and Trust Company, they did not become enforceable obligations of

the Railroad Company until the discharge by Kneeland of the old narrow gauge indebtedness and their delivery by the Trust Company to him against such discharge. They were in reality treasury bonds of the Railroad Company.

(j) These first mortgage bonds, therefore, even although treated as issued by the Railroad Company, did not, by their delivery to the Farmers' Loan and Trust Company, pass to Kneeland save on compliance by him with the precedent conditions of the trust then declared concerning them. They were never assets or property of Kneeland. He did not deposit them with the Trust Company; he was not entitled to them before their delivery to the Trust Company; he has never become entitled to them since their delivery to the Trust Company. Prior to June, 1891, he was entitled to earn them; subsequent to June, 1891, he was entitled to receive them on payment of the consideration specified—*i. e.*, the discharge of the narrow gauge prior claims. But he neither earned them prior to their delivery to the Trust Company, nor paid the consideration for them subsequent to their delivery to the Trust Company. They never vested in him at any time or in any manner, and until they should vest in him under the agreements of settlement, they were bonds to which the Railroad Company was entitled and which were its property.

The relations of the parties in 1898 were therefore these:

The property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company's mortgage was subject to a lien prior to the lien thereon of the first mortgage. For the discharge of that lien in exoneration of the first mortgage bonds, Kneeland personally was under a threefold obligation; to the Court, by reason of the terms of his original purchase; to the reorganization com-

mittees, by reason of the agreements of January 23, 1886; and to the railroad company, under the agreements of settlement of June, 1891, as well as under his agreements with its constituent companies.

To secure the discharge by Kneeland of these prior claims, the Farmers' Loan and Trust Company held the bonds in question, for delivery to Kneeland only as and to the extent that he should meet and discharge these prior claims. Kneeland could become entitled to these bonds, therefore, only as and to the extent that he himself should meet and discharge these prior claims and thereby relieve from the burden of the lien of these prior claims, the lien of the holders of the first mortgage bonds on the property embraced in the first mortgage.

But these prior claims being absolutely prior in right to the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, the rights of the holders of these claims against the property embraced in the first mortgage, were absolute. The fact that a fund for their payment had been created did not affect the rights of the holders against the property, and they obtained the enforcement of those rights.

These prior claims were paid out of moneys in the hands of the receiver in the suit brought to foreclose the Toledo, St. Louis and Kansas City first mortgage —in which cause this petition was filed—derived from the operation of the road, directly or through the receivers' certificates issued to take them up, or out of the corpus of the property embraced in the first mortgage of the Toledo, St. Louis and Kansas City Railroad Company, foreclosed in this action. Whichever the source of payment, it was out of property embraced in the first mortgage of the Railroad Company; the fund out of which the bondholders were to be paid; in other words, out of the very property which by the agreements of settlement of June, 1891, it was intended to protect. On that payment, therefore, the conditions of the agreements of June, 1891, on which these bonds might

become deliverable to Kneeland, became incapable of fulfillment, and the Receiver became entitled to these bonds as assets of the Railroad Company. The agreements of June 1, 1891, declare no trust on the part of the Trust Company with respect to these bonds, in the event of Kneeland's failure to pay these prior claims, and when the conditions on which they might become deliverable to him became impossible of fulfillment, the trust ceased, and the receiver became absolutely entitled to these bonds.

It was, however, suggested on the argument below that because the plea contains the statement that the allegations of the complaint in the New York action attached to the plea as an exhibit, were true, and because among these allegations was one to the effect that these bonds were never assets of the Railroad Company, it must for the purposes of this argument be assumed that the bonds were never assets of the Railroad Company. The suggestion hardly calls for serious consideration. The petition sets out the entire chain of title of the Railroad Company to these bonds, and this is admitted by the plea, so that, in any event, this statement in the plea is a mere statement of a conclusion of law and was not admitted by setting down the plea for argument.

By the decree of foreclosure of the first mortgage of the T., St. L. & K. C. R. R. Co., that mortgage is decreed to be a valid and subsisting first lien, among other things, on

> "all leases and leasehold interests, contracts, choses in action, including bills receivable, traffic balances and claims of every character, * * owned by said respondent railroad company at the date of the execution of said first mortgage, or which it has since at any time acquired; * * all other property, rights to property or interests in property, of whatever description, owned by the respondent railroad company at the date of the execution of its said first mortgage, or thereafter at

> any time by it acquired or held in trust for it or for its benefit in extension of or appurtenant or incidental to the railroad and property above described or described in and covered by said first mortgage; * * * and all other property, real, personal and mixed, and interests in property and all choses in action at any time prior to the delivery to the purchasers of the property sold under this decree, acquired by any receiver in this cause, or becoming vested in any receiver in this cause, or held in trust for him or for his benefit, and all moneys, profits and income derived, or at any time hereafter to be derived, by any receiver in this cause from the operation of the property herein adjudged to be subject to said first mortgage" *(see Supplemental Record, pp. 5-7).*

The decree of foreclosure also contains the usual provisions permitting the purchasers to use in making payment of the purchase price, first mortgage bonds taken at a price equivalent to the cash dividend to which they would be entitled out of the net proceeds of sale.

Prior to the filing of the petition of Hunt, Receiver, and on April 18, 1900, the order of confirmation of sale was made and entered *(see Supplemental Record, p. 16).*

It provides, among other things, "*that the distribution of the proceeds of sale* and all allowances and compensation *are reserved for future order (See Opinion, p. 96; Supplemental Record, p. 18).*

It is obvious that the court below was the only court which could exercise the power to distribute the fund.

That court necessarily had the power to determine two questions; certainly as regards all parties to the cause: *i. e.*

> (1) What property was sold under its decree.
>
> (2) What cash dividend was distributable to the first mortgage bonds, and, as a necessary element in this, what bonds were entitled to share in the net proceeds of sale.

Finally, the first mortgage bonds were not only in default and overdue for upward of six years, but were merged in the decree of foreclosure. They became merely evidences of the right to share in the proceeds of sale, and that right it was not only the province of the Circuit Court to determine, but its exclusive province (see Opinion, p. 96).

III. As an ancillary and dependent proceeding, supplementary to the original suit out of which it arose, the proceeding was properly maintainable without reference to the citizenship or residence of the parties to the proceeding.

Freeman vs. Howe, 24 How., 450.

It may be proper to cite at some length the decisions of this court and of other courts bearing upon the proposition just stated.

Minnesota Co. vs. St. Paul Co., 2 Wall., 609:

> "The question is not whether the proceeding is supplemental and ancillary or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts. No one, for instance, would hesitate to say that according to the English Chancery practice a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the Circuit Court to enjoin a judgment of that court, it is not to be considered as an original bill but as a continuation of the proceeding at law, so much so that the court will proceed in the injunction suit without actual service of the subpœna on the defendant and though he be a citizen of another State if he were a party to the judgment."

See, also, the very full discussion of the principles and of the cases in

Krippendorf vs. Hyde, 110 U. S., 276.

Rouse vs. Letcher, 156 U. S., 47:

"It is well settled that where property is in the actual possession of a court this draws to it the right to decide upon conflicting claims to its ultimate possession and control *(Minnesota Co. vs. St. Paul Co., 2 Wall., 609; Morgan Co. vs. I. C. Ry. Co., 137 U. S., 171, 201);* and since where assets are in the course of administration, all persons entitled to participate, may come in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though jurisdiction would be lacking if such proceedings had been originally and independently prosecuted *(Stewart vs. Dunham, 115 U. S., 61, 64; Richmond vs. Irons, 121 U. S., 27, 52),* and since, where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under jurisdiction already subsisting, such proceeding is to be regarded in that aspect, even in cases where the Circuit Court might have had jurisdiction of an independent action. * * * We think the use of the words 'suit or controversy' in the sixth section does not affect the conclusion. If the word controversy added anything to the comprehensiveness of the section, the fact remains that the exercise of the power of disposition over this intervention, whether styled suit or controversy, was the exercise of power invoked at the institution of the main suit, and is to that point of time that the inquiry as to jurisdiction must necessarily be referred *(C. C. Mining Co. vs. Turck, 150 U. S., 138).*"

Gregory vs. Van Ee, 160 U. S., 643 :

"In *Rouse vs. Letcher*, 156 U. S., 47, we held that, if the decree of a Circuit Court of Appeals is final under the sixth section of the Judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so because the intervention is entertained in virtue of jurisdiction in the Circuit Court already subsisting. It was pointed out that, where property is in the actual possession of the Circuit Court, this draws to it the right to decide upon conflicting claims for its ultimate possession and control, and that where assets are in the course of administration, all persons entitled to participate may come in under the jurisdiction acquired between the original parties by ancillary or supplemental proceedings, even though jurisdiction in the Circuit Court would be lacking if such proceedings had been independently prosecuted; that the exercise of the power of disposition by a Circuit Court of the United States over such an intervention is the exercise of a power invoked at the institution of the main suit, and that it is to that point of time that the inquiry as to the jurisdiction of the Circuit Court must necessarily be referred. Therefore, that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained.

"The Circuit Courts of the United States have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly they entertain and dispose of interventions and the like on familiar and recognized principles of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the

statutes, and to that source must always be attributed."

Porter vs. Sabin, 149 U. S., 473:

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is the possession of the court and the court itself holds and administers the estate, through the receiver as its officer for the benefit of those whom the court shall ultimately adjudge to be entitled to it (citing with other cases, 136 U. S., 223; 136 U. S., 287, 297).

"It is for that court in its discretion to decide whether it will determine for itself all claims *for* or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of and no suit unless expressly authorized by statute can be brought against the receiver without the permission of the court which appointed him.

"The reasons are yet stronger for not allowing a suit against a receiver appointed by state court, to be maintained or the administration by that court of the estate to be interfered with, by a court of the United States, deriving its authority from another government though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the court which appointed the receiver, including all rights of action except so far as already lawfully disposed of under orders of that court remains in

its custody to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no court of the one government can by collateral suit assume to deal with rights of property or of action constituting part of the estate within the exclusive jurisdiction and control of the rights of the other *(Wiswall vs. Sampson, 14 How., 52, 65 ; Ball vs. Phipps, 14 How., 368, 374 ; Barton vs. Benbow, 104 U. S., 126 ; Williams vs. Benedict, 8 How., 107 ; Pullman vs. Osborne, 17 How., 471 ; Peoples Bank vs. Calhoun, 102 U. S., 256 ; Herdritter vs. Elizabeth Oil Cloth Co., 112 U. S., 294 ; In re Tyler, 149 U. S., 164).*"

White vs. Ewing, 159 U. S., 37 :

" The Circuit Court obtained jurisdiction over the Cardiff Coal and Iron Co. by the filing of the original bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver in the course of the winding up of such corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit and as cognizable in the Circuit Court, regardless either of the citizenship of the parties or of the amount in controversy.

" Indeed, it was conceded that where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that court the control of its assets so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court to assert their rights, prove their demands and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to

them of claims which they may hold against the estate and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company and has no higher rights than the corporation, and, having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

"This position is entirely correct so far as the right of the receiver to recover upon the merits is concerned, but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits." * * *

"In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of which it is charged, and if the Receiver in such cases appears as a party to the suit it is only because he represents the Court in its inherent power to wind up the estate of an insolvent corporation over which it has by original bill obtained jurisdiction. In this particular, the jurisdiction of the Circuit Court does not differ materially from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted. There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of want of diverse citizenship as upon the ground that the requisite amount is not involved."

Gableman vs. P. D. & E., 101 Fed. Rep., 1:

"The decision in this case *(White vs. Ewing,* 159 U. S., 36) went upon the principal that suits ancilliary to the receivership fall to the jurisdiction of the court appointing the receiver, in other words, that the diversity of citizenship that gave to the United States Circuit Court jurisdiction in the original case was carried over to all strictly ancilliary suits. This has frequently been decided

since in other cases. *Krippendorf vs. Hyde*, 110 U. S., 276; *Pacific R. Co., of Mo., vs. Mis. Pac. Ry. Co.*, 111 U. S., 505.) * * *

"The case now under consideration is not, properly speaking, ancillary to the case brought in the Circuit Court of the Southern District of Illinois, in which the receiver was appointed. It does not aid or supplement the purposes of that suit. It is not brought by the receiver, but against him. It is not intended directly to increase or diminish, or in any way affect, the assets intrusted to him, whatever may be its incidental effect."

The complaint in the action instituted by Bache in the Supreme Court of the State of New York is attached to the plea as an exhibit, and it is worthy of remark that the plaintiff in that action who is a party to this cause and bound by the decrees therein, has carefully avoided making defendant in the New York action, any person who has, or might fairly be assumed to have, a real interest in the securities in question. The sole parties defendant are the Railroad Company, which had been for more than seven years in the hands of a receiver; Kneeland, who is in default in all his obligations, and the Farmers' Loan and Trust Co., which, by reason of the impossibility of the fulfillment by Kneeland of the conditions on which the bonds might become deliverable to him, had become a mere depositary.

The pendency of the suit in New York has no bearing upon the question before the court. Bache may bring that suit to judgment and procure a sale of the deposited securities; but the purchaser would of course take them subject to the trust under which the petitioner's claim is asserted, and the matter to be determined, whether or not they would be entitled to share in the proceeds of sale, would eventually come before the Circuit Court for the Northern District of Ohio to be disposed of by that court.

IV. The procedure by petition was regular and proper.

(*a*) It was unnecessary to file a bill, whether that bill be an original dependent bill, supplemental bill or cross-bill. The questions presented by the petition may properly be raised by petition in the nature of a petition *pro interesse suo*.

Krippendorf vs. Hyde, 110 U. S., 276.

(*b*) All the parties to the petition were parties to the foreclosure action with the exception of the Farmers' Loan and Trust Company, which is a mere stakeholder without interest of any kind in the subject matter, except possibly as to its charges for services as trustee which the person receiving the securities would be required to pay as an incident to the delivery. It does not appear, however, that there are any such charges.

It is deemed unnecessary to discuss *seriatim* the twenty-two assignments of error. The claim that the court below was without jurisdiction because the bonds were not physically within the District; that because a decree of foreclosure had been entered the court below could entertain no petition affecting the fund; that the court could not look at its own record in the suit in which the petition was filed (Assignments, 16 & 17, pages 116, 117), are utterly without merit.

SECOND. The Circuit Court had jurisdiction of the person of the appellant.

If that court had jurisdiction to entertain this proceeding as ancillary to and dependent on the foreclosure action, the plea, so far as it attempted to raise questions based on the citizenship or residence of the respondents, was properly overruled; and the sole question was as to the regularity of the service upon Bache of the order to plead to the petition.

I. Bache cannot raise by plea or otherwise the sufficiency of the service on other respondents. That is personal to them.

II. All the parties to the petition were parties to the foreclosure suit except the Farmers' Loan and Trust Company (see Decree of Foreclosure, Additional Record, p.), which was a mere depositary without interest in the subject matter. It will be time to deal with that company when it undertakes to assert any rights by virtue of its possession of the bonds.

Bache, as a junior encumbrancer, still remains a party to the suit, and was before the court for all the purposes of distribution of the proceeds of the sale of the mortgaged property. The fund is in the Circuit Court and that court had the right to direct its disposition (see *Opinion*, pp. 96, 97).

III. The procedure by petition *pro interesse suo* being regular (*Krippendorf vs. Hyde, supra*), the method of service properly followed the English Chancery practice in cases of this character.

A subpœna does not issue upon an intervening petition, or petition *pro interesse suo*, but on application to the court leave is given by order to file the petition, and the respondents are directed by order to plead thereto within the time limited. This has been the general and settled practice.

Daniel, Ch. Pr., Ch. XXVI., § 7, p. 1057:

> "This inquiry is called an examination *pro interesse suo*, and an order for such an examination may be obtained by a party interested. * * *
>
> "The application for the order is usually made by motion, supported by affidavit showing the facts under which the claim arises."

IV. The proper procedure of Bache to raise any question of the sufficiency of the mode of service upon him of the order to plead to the petition was by motion to set aside, which he never made.

THIRD. The order substituting Wallace and the Toledo, St. Louis and Western Railroad Company as assigns of the purchasers were regular and proper.

It is elementary law that the purchaser at a foreclosure sale, and his assigns, become in effect parties to the cause for all purposes connected with the decree and its enforcement, and the orders merely made the record. As he subjects himself by his purchase to the jurisdiction of the court, in so far as the purchase itself is concerned, and can be compelled to perform his agreement specifically, he acquires a right to appear and to claim such relief as he is entitled to by the rules of equity procedure.

Short's Law of Railway Bonds and Mortgages, 830.
Blossom vs. Milwaukee, &c., R. R., 1 Wallace, 655.

FOURTH. The orders appealed from should be affirmed.

ADRIAN H. JOLINE,
CLARENCE BROWN,
Of Counsel for Appellee.

Supreme Court of the United States.

No. 177.—October Term, 1903.

Jules S. Bache, Appellant,
vs.
Samuel Hunt, as Receiver of the St. Louis, Toledo and Kansas City Railroad Company, and Toledo, St. Louis and Western Railroad Company.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

[April 4, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This case was brought directly to this court as coming within the first of the classes of cases enumerated in section five of the judiciary act of March 3, 1891, in which that may be done, the Circuit Court having certified that the jurisdiction of the court was in issue, and granted the appeal on that ground.

The case was briefly this: Samuel Hunt, receiver, filed his petition in the Circuit Court of the United States for the Northern District of Ohio in the foreclosure suit of *The Continental Trust Company of New York* v. *The Toledo, St. Louis & Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland and others*, asserting that he was entitled, out of certain of the first mortgage bonds foreclosed in the suit, and stock of the railroad company, in the hands of the Farmers' Loan and Trust Company, to be reimbursed for amounts paid by him, or his predecessors, as receiver, in the extinguishment of prior claims which the bonds and stock had been deposited to secure, and seeking a decree that they be delivered to him or sold and the proceeds so delivered, &c. The deposit had been made to secure payment of certain underlying liens, which Kneeland had agreed to pay and discharge, and which he had failed to do, and the receiver had done so out of the moneys and property of the railroad company.

Bache, who was a citizen of and resided in New York, and others were ordered to demur, plead or answer the petition, and copies of the order were mailed to the parties named, including Bache. Bache appeared specially and filed a plea to the jurisdiction of the court over the subject matter because of the pendency in the Supreme Court of New York of a suit instituted prior to the filing of Hunt's petition by Bache as a judgment creditor of Kneeland against the Toledo, St. Louis and Kansas City Railroad Company, Kneeland and the Farmers' Loan and Trust Company, in which the last-mentioned company had been appointed receiver

of the securities forming the subject of the Hunt petition, on the same day on which the Hunt petition was filed; and of his person because of the insufficiency of the method of service of the order. The plea was overruled.

The Circuit Court held that when the receiver used the moneys of the receivership to discharge the underlying liens, the equitable right accrued to him and to those whom he represented, to be reimbursed out of the securities deposited with the Farmers' Loan and Trust Company; and that as a junior encumbrancer, Bache had never been dismissed from the suit, and as such was before the court for all purposes of the distribution of the proceeds of the sale of the mortgaged property. It appeared that Bache was made one of the original defendants in the foreclosure suit as a junior encumbrancer and entered his appearance; that he afterwards set up his claim, by answer, in that suit, it being the same claim on which his proceeding in the State court was founded; that he filed his claims before the special master under order in that behalf; and that Kneeland was also a party to the cause.

Bache, declining to plead further, the petition was taken as confessed as to him, and a decree was subsequently entered that the Toledo, St. Louis and Western Railroad Company, as successor to the rights of Hunt, as receiver, and his predecessors, was entitled out of the securities in the hands of the Farmers' Loan and Trust Company to be reimbursed in the amounts which had been paid by the receivers in respect of the prior claims; and that said securities be delivered to the railroad company, or, on default of such delivery within thirty days, that they should stand cancelled and of no further force or effect. From this decree the pending appeal was thereupon taken.

It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the act of March 3, 1891, provides may be certified to this court directly, must be one involving the jurisdiction of the Circuit Court as a Federal court. *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Blythe* v. *Hinckley*, 173 U. S. 501.

Tested by this rule our jurisdiction fails, and the appeal must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.